

THE LAW
OF
HOMICIDE AND HURT
IN BRITISH INDIA

(Including Rioting and Dacoity)

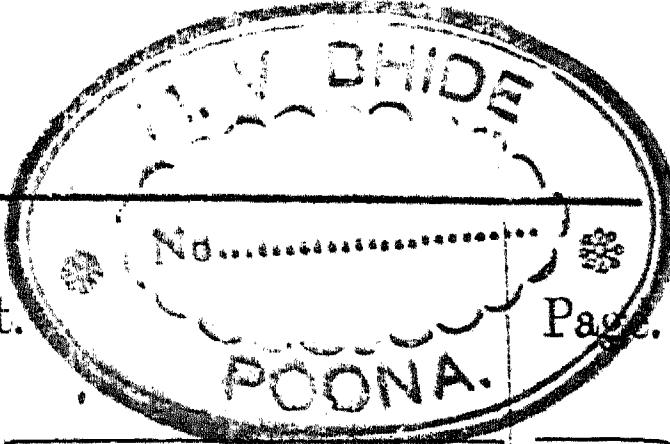
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ABBREVIATIONS EXPLAINED.

A.	... Indian Law Reports, Allahabad Series.
A. L. J.	... Allahabad Law Journal.
A. W. N.	... Allahabad Weekly Notes.
B.	... Indian Law Reports, Bombay Series.
B. H. C.	... Bombay High Court Reports.
B. L. R.	... Bengal Law Reports.
Bom. Cr. C.	... Bombay Criminal Cases.
Bom. L. R.	... Bombay Law Reporter.
Bur. L. R.	... Burma Law Reports.
Bur. L. T.	... Burma Law Times.
C.	... Indian Law Reports, Calcutta Series.
C. L. J.	... Calcutta Law Journal.
C. L. R.	... Calcutta Law Reports.
C. P. L. R.	... Central Provinces Law Reports.
C. W. N.	... Calcutta Weekly Notes.
Cr. L. J.	... Criminal Law Journal
Ind. Cas.	... Indian Cases.
L.	... Indian Law Reports, Lahore Series.
L. B. R.	... Lower Burma Rulings.
M.	... Indian Law Reports, Madras Series.
M. H. C.	... Madras High Court Reports.
M. L. J.	... Madras Law Journal.
M. L. T.	... Madras Law Times.
M. W. N.	... Madras Weekly Notes.
N. L. R.	... Nagpur Law Reports.
N. W. P. H. C.	... North-West Provinces High Court Reports.
O. C.	... Oudh Cases.
Pat. L. J.	... Patna Law Journal.
P. L. R.	... Punjab Law Reporter.
P. R.	... Punjab Record.
P. W. R.	... Punjab Weekly Reporter.
Rat. Un. Cr. C.	... Ratanlal's Unreported Criminal Cases.
S. L. R.	... Sind Law Reporter.
U. B. R.	... Upper Burma Rulings.
W. R.	... Sutherland's Weekly Reporter.
Weir	... Weir's Criminal Rulings.

PREFACE.

In compiling this book on the Law of Homicide and Hurt in British India my purpose was to present in greater detail than has hitherto been done the Judicial decisions on this important branch of the criminal law.

In commentaries that deal with the whole of the criminal law, it is scarcely possible to quote and discuss every ruling of all the Courts, and there is always a danger that only those decisions will be cited which support the author's own views; if contrary decisions are cited, space does not permit a careful discussion of the different principles enunciated. Generally also the decisions of the smaller Courts are not considered.

I cannot of course claim to have cited every ruling dealing with homicide and hurt; but the number cited is greater and the discussion more detailed than in any other commentary.

Generally the rulings of each Court have been separately produced in chronological order; and in the General Remarks at the end of each subject I have endeavoured to analyse the theories adopted by each Court and to show where they differ or coincide.

THE LAW
OF
HOMICIDE AND HURT
IN BRITISH INDIA.

CHAPTER I.

CULPABLE HOMICIDE AND MURDER.

Section 299.—Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

ILLUSTRATIONS.

(a) A lays sticks and turf over a pit with the intention of thereby causing death or with the knowledge that death is likely to be thereby caused. Z, believing the ground to be firm, treads on it, falls in and is killed. A has committed the offence of culpable homicide.

(b) A knows Z to be behind a bush. B does not know it. A intending to cause or knowing it to be likely to cause Z's death, induces B to fire at the bush. B fires and kills Z. Here B may be guilty of no offence; but A has committed the offence of culpable homicide.

(c) A, by shooting at a fowl with intent to kill and steal it, kills B who is behind a bush, A not knowing that he was there. Here, although A was doing an unlawful act, he was not guilty of culpable homicide, as he did not intend to kill B or to cause death by doing an act that he knew was likely to cause death.

Explanation 1.—A person who causes bodily injury to another who is labouring under a disorder, disease or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death.

Explanation 2.—Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death although by resorting to proper remedies and skillful treatment the death might have been prevented.

Explanation 3.—The causing of the death of a child in the mother's womb is not homicide. But it may amount to culpable homicide to cause the death of a living child if any part of that child has been brought forth, though the child may not have breathed or been completely born.

Section 300.—Except in the cases hereinafter excepted culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or, secondly, if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; or thirdly, if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or fourthly, if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

ILLUSTRATION.

(a) A shoots Z with the intention of killing him. Z dies in consequence. A commits murder.

(b) A, knowing that Z is labouring under such a disease that a blow is likely to cause his death, strikes him with the intention of causing bodily injury. Z dies in consequence of the blow. A is guilty of murder, although the blow might not have been sufficient in the ordinary course of nature to cause the death of a person in a sound state of health. But if A, not knowing that Z is labouring under any disease, gives him such a blow as would not in the ordinary course of nature kill a person in a sound state of health here A, although he may intend to cause bodily injury, is not guilty of murder if he did not intend to cause death, or such bodily injury as in the ordinary course of nature would cause death.

(c) A intentionally gives Z a sword cut or club wound sufficient to cause the death of a man in the ordinary course of nature. Z dies in consequence. Here A is guilty of murder, although he may not have intended to cause Z's death.

(d) A without any excuse, fires a loaded cannon into a crowd of persons and kills one of them. A is guilty of murder, although he may not have had a premeditated design to kill any particular individual.

Exception I.—Culpable homicide is not murder, if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident.

The above exception is subject to the following provisos :—

First. That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly. That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of his powers of such public servant.

Thirdly. That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation.—Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

ILLUSTRATION.

(a) A, under the influence of passion excited by provocation given by Z, intentionally kills Y, Z's child. This is murder inasmuch as the provocation was not given by the child, and the death of the child was not caused by accident or misfortune in doing an act caused by the provocation.

(b) Y gives grave and sudden provocation to A. A on this provocation fires a pistol at Y neither intending nor knowing himself to be likely to kill Z who is near him but out of sight. A kills Z. Here A has not committed murder, but merely culpable homicide.

(c) A is lawfully arrested by Z, a bailiff. A is excited to sudden and violent passion by the arrest, and kills Z. This is murder, inasmuch as the provocation was given by a thing done by a public servant in the exercise of his powers.

(d) A appears as a witness before Z, a Magistrate. Z says that he does not believe a word of A's deposition, and that A has perjured himself. A is moved to sudden passion by these words and kills Z. This is murder.

(e) A attempts to pull Z's nose. Z, in the exercise of the right of private defence, lays hold of A to prevent him from doing so. A is moved to sudden and violent passion in consequence and kills Z. This is murder, inasmuch as the provocation was given by a thing done in the exercise of the right of private defence.

(f) Z strikes B. B is by this provocation excited to violent rage. A, a bystander, intending to take advantage of B's rage and to cause him to kill Z, puts a knife into B's hand for that purpose. B kills Z with the knife. Here B may have committed only culpable homicide, but A is guilty of murder.

Exception 2.—Culpable homicide is not murder, if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence, without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence.

ILLUSTRATION.

Z attempts to horsewhip A not in such a manner as to cause grievous hurt to A. A draws out a pistol. Z persists in the assault. A believing in good faith that he can by no other means prevent himself from being horsewhipped, shoots Z dead. A has not committed murder, but only culpable homicide.

Exception 3.—Culpable homicide is not murder, if the offender, being a public servant, or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant, and without any ill-will towards the person whose death is caused.

Exception 4.—Culpable homicide is not murder, if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender's having taken undue advantage, or acted in a cruel or unusual manner.

Explanation.—It is immaterial in such cases which party offers the provocation or commits the first assault.

Exception 5.—Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent.

ILLUSTRATION.

A, by instigation, voluntarily causes Z, a person under eighteen years of age, to commit suicide. Here on account of Z's youth, he was incapable of giving consent to his own death. A has therefore abetted murder.

Section 301.—If a person, by doing anything which he intends or knows to be likely to cause death, commits culpable homicide, by causing the death of any person whose death he neither intends, nor knows himself to be likely to cause, the culpable homicide committed by the offender is of the description of which it would have been, if he had caused the death of the person whose death he intended or knew himself to be likely to cause.

Section 302.—Whoever commits murder shall be punished with death, or transportation for life, and shall also be liable to fine.

Section 303.—Whoever, being under sentence of transportation for life, commits murder shall be punished with death.

Section 304.—Whoever commits culpable homicide not amounting to murder shall be punished with transportation for life or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death;

or with imprisonment of either description for a term which may extend to ten years or with fine or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death or to cause such bodily injury as is likely to cause death.

GENERAL.

Original Code.

In the Code as originally drafted in 1837 the sections dealing with homicide and murder differed considerably from the present sections.

They began with Section 294 which ran as follows :—

“Whoever does any act or omits what he is legally bound to do, with the intention of thereby causing or with the knowledge that he is likely thereby to cause the death of any person, and does by such act or omission cause the death of any person is said to commit the offence of ‘voluntary culpable homicide.’”

Section 295 ran :—“Voluntary culpable homicide is ‘murder,’ unless it be of one of the three mitigated descriptions hereafter enumerated, that is to say :—

First. Manslaughter.

Secondly. Voluntary culpable homicide by consent.

Thirdly. Voluntary culpable homicide in defence.”

Section 296 is the same as present Section 301 with a few minor differences.

Section 297 laid down that voluntary culpable homicide is “manslaughter when it is committed on grave and sudden provocation by causing the death of the person who gave the provocation.” The explanation was much the same as the provisos to Exception 1 of Section 300.

Section 298 defined “voluntary culpable homicide by consent,” namely when the person whose death is caused, being above twelve years of age, suffers death or takes the risk of death by his own choice.

Section 299 ran :—“Voluntary culpable homicide is ‘voluntary culpable homicide in defence’ when it is committed by causing death under such circumstances that such causing of death would be no offence if the right of private defence extended to the voluntary causing of death in cases of assault not falling under any of the descriptions enumerated in clause 76, or in cases of theft, mischief, or criminal trespass, not falling under any of the descriptions enumerated in clause 79.”

Clauses 300—303 prescribed the punishments for the various forms of culpable homicide. The punishment for murder

No.....
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was death, transportation for life or rigorous imprisonment for life, and fine ; for manslaughter, imprisonment up to fourteen years and fine or both ; for voluntary culpable homicide by consent imprisonment up to fourteen years with a minimum of two years and fine ; for voluntary culpable homicide in defence, imprisonment up to fourteen years and fine.

Report of Law Commissioners.

In July 1846 the Law Commissioners issued their report on the draft Penal Code, but proposed no great alterations in these sections.

The proposed Code was then circulated for opinion throughout India.

New Draft by Government of India.

In 1851 the Government of India drafted a new Code, which was almost entirely different from the original. For instance, Section 328 ran : "whoever maliciously kills any other person commits 'Murder,'" and section 331 ran : "whoever otherwise than maliciously or by mischance kills any other person, being neither a convict lawfully put to death in execution of a lawful sentence nor a person lawfully killed in war or in the exercise of the right of defence, commits 'Manslaughter.'" The following sections define "Extenuated Manslaughter" and "Justified Manslaughter."

This draft and the various opinions submitted on the original draft may be found in "Returns and Papers relative to the affairs of the East India Company, No. 263 of 1852."

It is evident that this new draft was not accepted and that the final Code was based on the original draft ; but I regret that I was unable to find a trace of any papers relating to the Code between 1851 and 1860.

By the courtesy of the officials of the India Office I was allowed to see the above papers, but they were unable to find any further documents relating to the Penal Code, and there is in the India Office no copy of the report of the Select Committee, which was presented to the Legislative Council in India on December 6th, 1856. On January 3rd, 1857 the Bill was read for a second time, and it was then practically in its present form.

It is unfortunate that this report of the Select Committee is not available, as the reasons and opinions of the framers of the sections on homicide in their present form would have been a valuable help towards the discussion of the correct interpretation of those sections.

Comparison of present Code and original draft.

If we compare clause 294 in the original draft, and present Section 299, it will be seen that, though there is some change in phraseology, the two sections are similar, except that in the present section the words "or with intention of causing such bodily injury as is likely to cause death" are added. Under the original Code, all acts or omissions causing death were voluntary culpable homicide if there was (1) an intention of causing death or (2) a knowledge that the act was likely to cause death ; and *all* such acts or omissions were murder, unless

- (1) there was grave or sudden provocation (manslaughter), or
- (2) there was consent (voluntary culpable homicide by consent)
- or (3) there was self-defence (voluntary culpable homicide in defence).

In the present Section 300, in addition to clauses (2) and (3) consequent on the added clause (b) of Section 299, there was the addition of clause (4); and the original proposal was not approved that *any* act done with the knowledge that it was likely to cause death was murder, unless it fell under one of the extenuated forms.

It is about these additional clauses, as will be seen later, that controversy has most fiercely raged; and it is therefore unfortunate that the reasonings of the framers of these clauses are not available.

The words "or omits what he is legally bound to do" were omitted in the final Code and a general Section (32) added to the effect that words which refer to acts done extend also to legal omissions.

General discussion of sections relating to culpable homicide and murder.

With these introductory remarks I will proceed to a general discussion on the sections relating to culpable homicide and murder as they appear in the present Code.

All murder is culpable homicide but all culpable homicide is not murder. Subject to the five exceptions to Section 300 every act which falls within one or more of the four clauses of that section is murder, and also falls within the definition of culpable homicide in Section 299. Every act which falls within any or more of the four clauses of Section 300 in respect of which there co-exist one or more of the sets of circumstances described in the five exceptions is by that fact taken out of Section 300, but the act continues to be within Section 299, and since it is not murder, it is culpable homicide not amounting to murder. Every act that falls within Section 299 and does not fall within Section 300, since it is not murder, is culpable homicide not amounting to murder. (*Reaz-ud-din Shaikh v. Empress*, 6 Ind. Cas. 251, 11 Cr. L. J. 295; 1910).

The following tabular comparison will show how nearly identical are the terms of Sections 299 and 300:—

<i>Section 299,</i>	<i>Section 300.</i>
Culpable homicide is causing death by an act or omission (a) with the intention of causing death, or	Culpable homicide is murder if the act or omission is done (1) with the intention of causing death, or
(b) with the intention of causing a bodily injury, likely to cause death, or	(2) with the intention of causing a bodily injury such as the offender knows is likely to cause the death of a person to whom the harm is caused, or
(c) with a knowledge that such act or omission is likely to cause death.	(3) with intention of causing bodily injury to any person, such bodily injury being sufficient in the ordinary course of nature to cause death, or (4) with a knowledge that the act or omission is so imminently dangerous that it must in all probability cause death, or a bodily injury likely to cause death.

The following is a quotation from the judgment of Plowden, J., in *Barkatulla v. Empress*, 32 P. R. 1887:—

Comparing the three clauses of Section 299 with the four defining clauses of Section 300 (apart from the exceptions) clause 1 of Section 300 is evidently co-extensive with clause 1 of Section 299. Clauses 2 and 3 of Section 300 are probably co-extensive with clause 2 of Section 299. But clause 4 of Section 300 is not co-extensive with clause 3 of Section 299. Every act causing death that falls within the first part of the definition in clause 4 of Section 300, whether or not it satisfies the whole definition in the clause, also falls within the definition in clause 3 of Section 299. But the converse is not true. Every act causing death that is done with the mere knowledge that the doer is likely by such act to cause death falls within clause 3 of Section 299 but it does not satisfy even the first part of the definition in clause 4 of Section 300, as that clause requires not merely knowledge that the act is likely to cause death, but further knowledge, namely that the act is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death. Further, the definition of murder in the 4th clause of Section 300 comprises two elements (in addition to the act of causing death) of which the second element is as essential as the first, and both are as essential as an act of causing death.

To cause death merely by doing an act with the knowledge that it is so imminently dangerous that it must in all probability cause death, does not constitute murder as defined in clause 4 of Section 300, but is mere culpable homicide not amounting to murder.

In order that an act done with such knowledge shall constitute murder, it is also necessary that it shall be committed "without any excuse for incurring the risk of causing death or such bodily injury." An act done with such knowledge alone is not *prima facie* murder subject to proof that there is some excuse. It becomes an act of murder only if it can be positively affirmed that there was no excuse. The requirements of this clause are not satisfied by the act of homicide being an act of extreme recklessness; it must be a wholly inexcusable act of extreme recklessness. It follows that when in view of all the circumstances found to exist in a particular case, it cannot be affirmed of an act falling in other respects within clause 4 of Section 300 that it was committed without any

excuse for incurring the risk mentioned, then such an act, notwithstanding that it was done with the knowledge that it was so imminently dangerous that it must in all probability cause death, is merely culpable homicide not amounting to murder under Section 299, clause 3. It is culpable homicide because the act causing death is done with the knowledge that the actor is thereby likely to cause death, it is not murder because it does not satisfy both parts of the definition of murder in clause 4 of Section 300.

It should further be noticed that in every case where an act is found to be culpable homicide amounting to murder under clause 4 of Section 300 or culpable homicide not amounting to murder under clause 3 of Section 299 by reason of the act being done with the *knowledge* that the doer is likely to cause death, an *intention* to cause death or such bodily injury as is likely to cause death, ought to be expressly negatived. When *intention* co-exists with the *knowledge*, the *knowledge* merges in the intention and a higher degree of guilt is imputable.

The general view of the law relating to culpable homicide may be restated as follows :—

There are practically three degrees of culpable homicide recognized in the Code—

- (1) Culpable homicide of the lowest degree which is punishable with fine only or with imprisonment up to a limit of ten years or with both (Section 304, Part 2).
- (2) Culpable homicide of the middle degree, which is made punishable with imprisonment up to a limit of 10 years, or with transportation for life, to either of which fine may be added (Section 304, Part 1).
- (3) Culpable homicide of the highest degree or murder which is made punishable with transportation for life or with death, to either of which fine may be added (Section 302).

Whenever death is caused intentionally the act of killing is murder, subject to the fact that five specified excuses (and five only) arising out of attendant circumstances are admissible to extenuate and reduce the degree of guilt (Section 300, Exceptions 1—5). When such an excuse exists, the act is culpable homicide of the middle degree.

When death is not intentionally caused, but the act committed evinces extreme recklessness of human life, and the act is with reference to the attendant circumstances wholly inexcusable in addition to being utterly reckless, the act of killing is likewise murder, subject to this, that the same five legal excuses are admissible. When a legal excuse is admitted, or if the act is not, with reference to its attendant circumstances, wholly inexcusable, the act is culpable homicide of the lowest degree.

Lastly when death is not intentionally caused, but the act is done notwithstanding the actor's knowledge that death will probably result from his act, the act is in the last mentioned instance, culpable homicide of the lowest degree."

It was noted in the above ruling (and also in *Attra v. Queen Empress*, 9 P. R. 1891 Cr.) that the Exceptions in Section 300 apply equally to clause 4 as to the other clauses of Section 300, and that where clause 4 of Section 300 would be applicable but for the proof of an exception, and an exception is proved, Section 304, Part 2, would be applicable. This is undoubtedly a correct conclusion, but the same conclusion can be reached by another process of reasoning. If one of the exceptions is proved, then it cannot be held that the act was committed "without any excuse;" and therefore the offence is no: an offence under Section 300, clause (4), but is only the offence of culpable homicide not amounting to murder, which in the absence of intention, is punishable under Section 304, Part 2.

The legal "excuses" found in the list of exceptions to murder or in the chapter of general exceptions do not complete the list of excuses as that term is used in the fourth clause of Section 300, but they must be included in that list.

The scope of the term "without any excuse" is discussed in *Suba v. The Empress* (40 P. R. 1888 Cr.). The term 'without any excuse' would mean 'in the absence of any exculpatory circumstances' other than any of those circumstances mentioned in the five exceptions to Section 300; and what a criminal court might regard as such must of course depend on the particular circumstances of each case. It would be for the court having to deal with the case to say, with due regard to the surrounding circumstances,...whether the act which had resulted in the death of a person was 'without any excuse,' and in arriving at a decision on this question, it would of course have to be guided as in all other judicial proceedings, by a sound and rational judgment."

Section 299 (c) and Section 300 (4).—The difficult question of the scope of the third part of Section 299 and the fourth part of Section 300 will be more conveniently discussed in the next chapter. There is a conflict of opinion on this point, and it will be necessary to refer specially to the rulings of the various courts.

Section 299 (b) and Section 300 (2) and (3)—There is also some conflict of opinion on the question whether the second clause of Section 299 is co-extensive with the second and third clauses of Section 300. In the above cited judgment Mr. Justice Plowden thought that they were probably co-extensive; and in *Gujan v. Queen-Empress*, 18 P. R. 1893, the Punjab Chief Court held that clauses 2 and 3 of Section 300 are mere amplifications of the second part of Section 299, *vide* also 3 P. R. 1911.

Similarly Mr. Mayne in para. 431 of his Criminal Law of India, after quoting *in extenso* from the judgment of Mr Barnes Peacock in *Queen v. Gora Chand Gope*, B. L. R. Sup. Vol. 443 = 5 W. R. Cr. 45, says "From this review it appears that, putting aside cases which come under the exceptions to Section 300 culpable homicide must always be murder unless the facts can be brought strictly within clause 3 of Section 299."

The Allahabad High Court in *Empress v. Idu Beg*, 3 A. 776, held that all acts of killing done with the intention to kill or to inflict bodily injury likely to cause death or with the knowledge that death must be the most probable result, are *prima facie* murder.

The generally accepted theory therefore is that when a person causes death by the intentional infliction of a bodily injury, which is likely to cause death, he is *prima facie* guilty of murder.

A contrary opinion however was expressed by Melvill, J., in *Reg. v. Govinda*, 1 B. 342, and has been adopted by the Chief Court of Lower Burma.

The following is an extract from the Bombay judgment :—

"The essence of (2) appears to me to be found in the words underlined. The offence is murder if the offender knows that the particular person *injured* is likely, either from peculiarity of constitution or immature age, or other special circumstances, to be killed by an injury which would not ordinarily cause death.

There remains to be considered (b) and (3) and it is on a comparison of these two clauses that the decision of doubtful cases like the present must generally depend. The offence is culpable homicide, if the bodily injury intended to be inflicted is *likely* to cause death, it is murder, if such injury is *sufficient in the ordinary course of nature to cause death*. The distinction is fine but appreciable. It is much the same distinction as that between (c) and (4) already noticed. It is a question of probability. Practically, I think, it will generally resolve itself into a consideration of the nature of the weapon used. A blow from a fist or a stick on a vital part may be likely to cause death; a wound from a sword in a vital part is sufficient in the ordinary course of nature to cause death."

The question was discussed by Mr. Justice Fox in *Shwe Ein v. King-Emperor*, 3 L. B. R. 122 = 3 Cr. L. J. 355 (1905).

I cite the following passages from his judgment:—

"The provisions of the Indian Penal Code regarding murder and culpable homicide not amounting to murder are undoubtedly somewhat obscure, and the distinctions between the cases stated are in some instances very fine. Taking as an example illustration (c) to Section 300, which is obviously the illustration intended for a case falling within the 3rd clause of the section, it appears to me that any ordinary person would reasonably and justifiably come to the conclusion that A in doing the act stated intended to kill Z, and in such case his act would fall under the first clause of the section. There may, however, be cases in which there may be a broader distinction than that afforded by illustration (c), and in which an intention to cause actual death might be negatived, while an intention to inflict what I will shortly call vital injury might be found.... Before arriving at a conclusion as to what the intention of the doer of an act causing death was, it is, I think, a good plan to put before oneself the whole category of intention expressed in the Code in connection with offences causing bodily injury.

1. An intention of causing death, which I take to refer to an actual intent that death shall be the result of the bodily injury which the offender inflicted.
2. An intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused (special

case as illustrated by illustration (b) of Section 300).

3. An intention of causing bodily injury sufficient in the ordinary course of nature to cause death.
4. An intention of causing such bodily injury as is likely to cause death.
5. An intention of causing grievous hurt, but grievous hurt which is not likely to endanger life.
6. An intention of causing hurt only.

To justify a conviction of culpable homicide of any sort against an offender who has committed an intentional act causing bodily injury to another, and which act was intended for some particular individual, there must at least be a finding that the offender intended by his act to *cause bodily injury likely to cause death*.

The first three degrees of intention stated above make the offence in the act causing death murder, unless one or more of the exceptions stated in Section 300 apply. If an exception applies, the first part of Section 304 regulates the punishment to be given.

If the offence has been committed with the fourth intention in the above category, the offence is culpable homicide not amounting to murder, and the punishment is also regulated by the first part of Section 304, being covered by the words 'if the act by which the death is caused is done with the intention of causing such bodily injury as is likely to cause death.'

Great difficulty may be experienced in deciding whether a case falls within the 3rd or the 4th category. The distinction between the degrees of bodily injury is fine but it is appreciable. That it exists, and was intended to exist, is, I think, shown by the wording 'with the intention of causing such bodily injury as is likely to cause death' in Section 299, and the wording 'bodily injury sufficient in the ordinary course of nature to cause death' in the third clause of Section 300.

.....In Queen v. Gorachand Gope Campbell, J., also recognized the fine distinction between the intention referred to in Sections 299 and 300, and said that an act which had caused death and had

been done with the intention of causing such bodily injury as was likely to cause death tallied more exactly with the definition of culpable homicide than with that of murder.

Not only may the degree of bodily injury intended be a matter of much difficulty, but the whole question of the accused's intention may present difficulties. In the absence of an expression of the intention by the accused previous to or after or at the time of committing the act, his intention can only be inferred from the act itself, and the circumstances under which it was done. In making an inference as to the accused's intention, the knowledge which must be attributed to him must usually be a matter of consideration. As Mr. Mayne says in para. 301, intent is sometimes a presumption of law; sometimes it is a mere fact to be proved like any other fact. A man is assumed to intend the natural and necessary consequences of his own act, and in the majority of cases the question of intention is merely the question of knowledge. If I strike a man on the head with a loaded club, I am assumed to know that the act will probably cause death, and if that result follows, I am assumed to have intended that it should follow."

The facts of the case were that in a moment of anger the accused struck the deceased one blow on the head with a piece of wood, 20 inches long, 8 inches in circumference, and $7\frac{1}{2}$ tolas in weight.

The judgment concludes:—"The decision must rest upon whether he must be held to have intended to cause bodily injury sufficient in the ordinary course of nature to cause death, or whether he only intended to cause such bodily injury as was likely to cause death.

I do not think an intention of causing a less degree of injury than that last mentioned can properly be attributed when such an instrument as that described above was used, for any sane man would know that in striking at another's head with such a weapon, he was at least likely to cause death...I think, however, that it would be going too far to hold that he must have known that he would probably cause death or vital injury, or to conclude that he intended to cause bodily injury sufficient in the ordinary course of nature to cause death. It is common knowledge that heads have stood blows with far more formidable weapons than the one used in this case."

The theory thus enunciated in *Reg. v. Govinda and Shwe Ein v. Emperor* has been followed in subsequent Burma rulings (*e.g.*, *Po Sin v. Emperor*, 5 L. B. R. 80; *Nga Po Lu v. Emperor*, 4 Bur. L. T. 253; *Kya Nyun v. King-Emperor*, 8 L. B. R. 125; *Maung Aung Tum v. Emperor*, 36 I. C. 592); but it does not appear to have been repeated by the Bombay High Court.

As a corollary to this theory, the Chief Court of Lower Burma has further held, as was held in *Reg. v. Govinda*, that the second clause of Section 300 refers only to such special cases as that instanced in illustration (b) of Section 300. If this theory were not adopted, in order to establish the theory that there can be a separate offence of culpable homicide not amounting to murder under clause 2 of Section 299, punishable under the first part of Section 304, it would be necessary to argue that there is a distinction between an intention to cause such bodily injury as is likely to cause death, and an intention of causing such bodily injury as the offender knows to be likely to cause death. There might possibly be cases in which the requisite knowledge could not be attributed to the offender, but these would be very rare; and it would generally be held that if an injury is likely to cause death the offender must be presumed to have known that it was likely to cause death, and the offence would be murder under Section 300 (2). But, according to the theory now under discussion, in order to bring an offence under the second clause of Section 300, it is necessary that the victim should have been labouring under some disease or infirmity or that his condition should have been such that the blow which would not have been fatal under ordinary circumstances was likely to be fatal to him, and that the offender should have known of this disease, infirmity or condition. This theory has also been accepted by the Judicial Commissioner of Sind in *Saidino v. Emperor*, 30 Ind. Cas. 998 (quoted under Chapter II, Class II). In *Emperor v. Sardar Khan*, 41 B. 27, the Bombay High Court held that if the offence in that case was murder, it would be murder only under the third clause, and the applicability of the second clause was not considered. It would appear from this that the Bombay High Court has accepted this theory as enunciated in *Reg. v. Govinda*.

The Madras High Court in *Syed Batcha Sahib v. Emperor*, 536 M. W. N. 1913, held that a person who inflicts injury on the person of another which ends fatally and which

the former should have known was likely to cause death is guilty of murder, although he had no wish to cause death or any motive for doing so. From this portion of the ruling, it would appear that it was intended that the second clause should not be interpreted in the restricted sense; but it is added that the law will presume that the person inflicting the injury intended to cause death. If there is a presumed intention to cause death, the offence would fall under the first clause of Section 300.

There can be no doubt that the second clause of Section 300 was framed in order to cover the special case of the illustration; but in the actual wording of the clause, read apart from the illustration, there appears to be nothing to justify such a restricted interpretation.

The point is of no importance if the theory be accepted that there is no difference between an injury that is likely to cause death, and an injury that is sufficient in the ordinary course of nature to cause death; for, in that case, any offence that falls under the second clause of Section 299 also falls under the third clause of Section 300.

It becomes of importance only if this theory is not accepted, because it has then to be considered whether an offence falling under the second clause of Section 299 but not under the third clause of Section 300 can be brought under the second clause of Section 300.

To sum up, the generally accepted theory would appear to be that any offence falling under the second clause of Section 299 will be murder under the second or third clause of Section 300; and the first part of Section 304 is applicable only in cases where the offence would have been murder if one of the exceptions had not applied.

The other theory, which is not so generally accepted, is that an offence may fall under the second clause of Section 299 but not under any clause of Section 300, such an offence being punishable under the first part of Section 304.

CHAPTER II.

WHAT OFFENCE HAS BEEN COMMITTED ?

I have discussed in the previous chapter the question whether or no the second clause of Section 299 and the second and third clauses of Section 300 are co-extensive.

It is extremely difficult to generalise about the other clauses of Sections 299 and 300. Each case has to be decided on its own particular facts, but there are many cases wherein the facts appear to be identical, but different conclusions have been reached.

I have decided that the most satisfactory way of dealing with the question will be to classify the cases, discover how each Court has dealt with each class of cases, and when possible attempt to evolve some general theory at the end.

This method will also enable the Courts of each Province to pick out at a glance the rulings of their own High or Chief Court.

The following classification will be suitable :—

Class I.—Cases where death has been caused by one man only by direct violence.

Class II.—Cases where death has been caused by more than one assailant by direct violence.

(I will not deal in this chapter with cases where there has been an unlawful assembly or with cases of riot or dacoity as these subjects will be dealt with in a separate chapter.)

Class III.—Cases where death has been caused by poison.

Class IV.—Cases where death has been caused to a child.

Class V.—Cases where death has been caused—

- (a) by surgical operation,
- (b) by snake bite,
- (c) by sexual intercourse.

CLASS I.—CASES WHERE DEATH HAS BEEN CAUSED BY ONE
MAN ONLY BY DIRECT VIOLENCE.

(A) The High Court of Bombay.

(i) *Reg. v. Bawaji*, Rat. Un. Cr. C. 63 (1872).

When a person is beaten and death ensues on account of the rupture of a diseased spleen, the offence is one under Section 321.

(ii) *Reg. v. Govinda*, 1 B. 342 (1876).

The accused, a young man of 18, knocked his wife down, struck her several times with his fist on the back, and, on her falling on the ground, put one knee on her chest, and struck her violently two or three times on the face, causing thereby an extravasation of blood on the brain resulting in her death. It was held that the accused was only guilty of culpable homicide not amounting to murder, as there was no intention to cause death, and as the bodily injury was not sufficient in the ordinary course of nature to cause death.

(iii) *Queen-Empress v. Budhiya*, Rat. Un. Cr. 398 (1888).

The accused struck at a man with whom he was quarrelling with a wooden rolling-pin. The blow missed its aim and falling on the head of a child caused its instant death. Held that the accused should be convicted of causing grievous hurt.

(iv) *Queen-Empress v. Lakhshman*, Rat. Un. Cr. C. 411 (1888).

When it is clear that the act by which the death of the deceased was caused was so dangerous that it must be presumed that the accused knew it to be likely to cause death, then unless the accused rebuts this presumption, he must be convicted under Section 299, and, if the case does not fall within the exceptions specified in Section 300, then under Section 300. A conviction under Section 326 is in such a case improper.

(v) *Queen-Empress v. Khandu*, 15 B. 194 (1890).

The accused struck his father-in-law three blows on the head with a stick with the intention of killing him. The deceased, fell down senseless on the ground. The accused, believing that he was dead, set fire to the hut in which he was lying with a view to remove all evidence of crime.

The medical evidence showed that the blows struck were not likely to cause death and did not cause death, and that death was really caused by injuries from burning when the accused set fire to the hut.

It was held (Parsons, J., dissenting) that the accused was guilty only of attempt to murder under Section 307. Parsons, J., was of opinion that the accused was guilty of murder.

(Mr. Mayne in his Criminal Law of India, paragraph 435, doubts the correctness of this decision. "If a man intending to kill another does two successive acts, the latter of which must necessarily kill him, can he be held free from the guilt of murder because it was effected by the second act instead of the first, and because the second act was intended for a purpose subsidiary to the first. He intended to murder the man and did murder him, and by an act which must necessarily have murdered him, if he had not been murdered already.")

(vi) Queen-Empress v. Dhondi, Rat. Un. Cr. C. 785 (1895).

When a man beats his wife in good faith, under a mistaken idea that by so doing the devil of which she is possessed would go away, and the wife subsequently dies from the after effects of the beating he cannot be convicted of murder or of any minor offence since what he did was done in ignorance and in good faith.

(NOTE.—In Nga Po Kyaw v. King-Emperor 1 U. B. R. 1902. 1903-1 in a similar case it was held that the accused committed an offence under Section 304A. See also Queen-Empress v. Jamal-ud-din, Rat. Un. Cr. C. 603, where there were more than one accused and they were held guilty under the second part of Section 304; and a similar finding was given in Nga Po Tha v. Emperor, 3 U. B. R. (1917) 54.)

(vii) Emperor v. Dumdyo, 4 Bom. L. R. 879 (1902).

The accused believing that a woman had bewitched another gave the former a severe beating and branded her in several places. She finally took to her bed and died on the sixth day after the beating. The accused were by a Second Class Magistrate convicted of offences under Section 323. It was held that the accused should be committed for trial on a charge of culpable homicide.

(viii) Emperor v. Sardar Khan, 41 B. 27 (1917).

The accused's father had quarrelled with the deceased as a result of which the deceased was discharged from the mill. He entered the mill after this and threatened the accused, a young man of 17 or 18. The accused lost his temper, rushed

out and brought two sticks, one of which he gave to accused No. 2. They immediately went out with the object of driving the deceased off the mill premises, as they said, or, as was implied in the finding of the Sessions Judge, of assaulting him. They came upon the deceased sitting with his back towards them just outside the weaving shed, and the accused, being armed with a stick about three feet long having iron rings, and about an inch in diameter, suddenly struck the deceased a violent blow on the back of the head which resulted in death within a few hours.

"If it is murder, it can only be so under the 3rd clause of Section 300 which enacts that culpable homicide is murder if the death is caused by an act done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. Now when death is caused by a single blow, as is the case here, struck probably under the influence of passion, it must always be a nice and difficult question to determine the precise intention of the offender. Doubtless the learned Sessions Judge has followed what, in a majority of cases, we think we must concede to be the right and logical course. He has inferred the intention, that is to say, from the extent of the injury and the nature of the weapon used. On the other hand when cases of this kind are tried by Jury, Juries are much more disposed to take a liberal and less logical view and to look at all the surrounding circumstances with the object, if possible, of reducing the offence, and so, notwithstanding the character of the injury and the nature of the weapon, imputing a lesser intention to the accused. When death is caused by a single blow, it is always much more difficult to be absolutely certain what degree of bodily injury the offender intended, particularly when the weapon used, although a very dangerous weapon, is one which is in the hands of so many people in that part of the country every day of their lives, when they go about their ordinary field business. It is on this ground and this ground alone that we are disposed to take a more lenient view of the offence..... that being so, we find less difficulty in coming to the conclusion that it is possible that the blow he struck exceeded in violence the injury he had in view at the moment of striking it. His mind would not have been very clear and it is hard to say that he could have had any definite intention of any kind at the moment. But, in saying that,

we do not wish to encourage loose applications of such inferential processes giving too liberal extension to the provisions of Section 300, clause 3. Every case must be dealt with on its own facts, and this case is, we think, one which will allow us to hold that the killing here can properly and legally be brought under Section 304, second part, rather than under Section 302."

(ix) *Emperor v. Bai Jiba*, 19 Bom. L. R. 823—4 Bom. Cr. C. 144 (1917).

In a sudden quarrel with the deceased, the accused seized him by the testicles and squeezed them with considerable force and for a considerable time.

Owing to his unsound condition, the deceased never recovered from the shock of the pain and died soon after. The medical evidence showed that the injury inflicted on the deceased would not in normal conditions have endangered his life. It was held that the accused was guilty of the offence of hurt.

(See 19 M. 356, where in a similar case two Judges found the accused guilty of culpable homicide not amounting to murder and the third Judge held that the accused was guilty only under Section 323.)

(x) *Chatur Natha v. Emperor*, 21 Bom. L. R. 1101—54 Ind. Cas. 485 (1920).

A woman, who was holding a child in her arms, intervened unexpectedly in a scuffle between the accused and her husband on a dark night. The accused aimed a blow at the husband with his stick but it accidentally struck the child and caused his death.

Held, that the accused was guilty only of the offence of causing simple hurt, inasmuch as he could not have intended to cause or have known that he was likely to cause death or grievous hurt.

(B). Allahabad.

(i) Empress of India v. Fox, 2 A. 522 (1880).

When a person, irritated by the lazy and inefficient manner in which the punkha cooly was managing the punkha gave him some blows, and the cooly died of the injuries he had received, it was held that as the blows were not heavy or severe, and the spleen of the deceased was in a very diseased condition, the accused could not have had in view the cooly's death as a probable or even a possible consequence of his act, and he was only guilty of hurt under Section 323.

(ii) Empress of India v. O'Brien, 2 A. 766 (1880).

The accused struck the deceased on the ribs with a stick and inflicted a hurt which not only endangered his life but actually caused his death, and which he must have known was likely to break a rib, if not cause a worse injury. It was held that the offence committed was grievous hurt, but not the offence mentioned in Section 304-A. Held also that the offence did not amount to culpable homicide, as the act was not done with any of the intentions mentioned in Section 299.

(iii) Empress of India v. Randhir Singh, 3 A. 597 (1881).

Where on the deceased's omission to drive away his pigs that were grazing on the accused's land, the latter took up a piece of brick and threw it at the deceased from a distance of five paces, and it struck him over the spleen, which, being in a diseased state, was ruptured and death ensued, it was held that the deceased was guilty of hurt only.

(iv) Empress v. Mulua, 112 A. W. N. 1881.

When death was caused by a blow with a stick, but it appeared that death would not have been caused by the violence apparently used, had the deceased's spleen been in a healthy condition, and the accused did not know that the deceased's spleen was diseased, it was held that the accused was merely guilty of voluntarily causing hurt by a dangerous weapon but not of culpable homicide.

(v) Empress v. Ram Prasad, 231 A. W. N. 1883.

A quarrel took place in the precincts of a Thakurdawara between the first accused and the deceased about a pigeon. They were ordered out of the precincts of the place. The first accused at once ran away to his house while the deceased

walked slowly away. The deceased had got to the door of a Shiwala about 150 yards from the Thakurdawara when the accused suddenly returned from his house armed with a long and heavy *lathi*, and ran after the deceased who at once ran into the Shiwala. He followed the deceased into the place and struck him a blow on the head which felled him to the ground. The first accused was followed by his father and uncle, armed with light *lathis*, and all three then struck several blows at the fallen deceased. It was held that the first accused was guilty of murder and the other accused were guilty under Section 324.

(vi) Queen-Empress *v.* Kallu, 74 A. W. N. 1890.

If men will use such a formidable and dangerous weapon as a *lathi* with such violence and on such a part of the body as causes death immediately or soon afterwards, they should be convicted of murder and not merely of culpable homicide not amounting to murder.

(vii) Queen Empress *v.* Kangla, 163 A. W. N. 1898.

When a person struck with a *lathi* and killed a man, being at the time under the *bona fide* belief that the object at which he struck was not a human being, but something supernatural, but, through terror, having taken no steps to satisfy himself that it was not a human being, it was held that he was guilty of the offence of culpable homicide not amounting to murder.

(viii) Laik Singh *v.* Emperor, 17 A. L. J. 56 = 49 Ind. Cas 169 (1919).

Deceased had received some incised wounds; he left the hospital for two days without the leave of the doctor, and, when he returned one wound not having been properly dressed for two days had deteriorated. After a few days he again left the hospital of his own accord, and subsequently died. The actual cause of death was septic pneumonia, but the Civil Surgeon was of opinion that this had resulted from the wound.

The accused was convicted under Section 326.

"It is open to argument whether the accused should be held to have caused the death of Bhagwan Singh within the meaning of Explanation 2 of Section 299. There must obviously be a limit somewhere; and a man who in the course of a trifling struggle was found to have inflicted a slight cut or abrasion

on the finger of another man, which being neglected became infected in some manner so as to induce tetanus, could scarcely be held to have caused the death of the other. It seems open to the Court to conclude that the injury to which the deceased eventually succumbed was not inflicted with such intention or knowledge as to bring the case within the definition of culpable homicide."

(ix) *Piare v. Emperor*, 17 A. L. J. 866 = 52 Ind. Cas. 724 (1919).

If a man takes a *lathi* and deliberately assaults another on the head with the result that the skull is fractured, that act is murder unless the accused can show that it is removed from the category of murder by one of the exceptions to Section 300.

(x) *Emperor v. Rama*, 42 A. 302 (1920).

R struck G three blows with a *lathi*, and fractured several bones. Gangrene supervened and G died in consequence.

Held that R was guilty either of culpable homicide not amounting to murder under Section 304, or of causing grievous hurt under Section 325.

"The learned Sessions Judge says that he must, by some presumption of law, be considered to have known that he was likely thereby to cause death. That finding as it stands might suffice for the definition of culpable homicide in Section 299, but it is not quite sufficient for the more stringent definition of murder in the fourth clause of Section 300."

C. Calcutta High Court.

(i) *In re Bejadhur Rai*, 2 C. L. R. 211 (1878).

The accused being wrested of his *lathi* in his attempt to strike the deceased with it armed himself subsequently with a sword and struck in the dark, which resulted in the death of the deceased by the wounds caused by the sword.

Held that the accused was guilty of murder.

(ii) *Empress v. Sahae Rae*, 3 C. 623 (1878).

When a person intends to inflict injury on a woman and one of the clowns falls on a child and kills it, the offence is causing grievous hurt.

(iii) *Empress v. Katabdi Mundul*, 4 C. 764 (1879).

To kick a girl of tender age with such force as to produce rupture of the abdomen in a healthy subject is an act of such a character that no reasonable man would be ignorant of the likelihood of its causing death and the conviction should be under the second part of Section 304.

(iv) *Emperor v. Dalu Sardar*, 18 C. W. N. 1279 = 15 Cr. L. J. 709 = 26 Ind. Cas. 157 (1914).

The accused assaulted his wife and gave her kicks, blows and slaps. The kicks were given below the navel. The woman fell down and became unconscious. In order to create appearance that the woman had committed suicide, the accused took up the unconscious body of his wife, thinking it to be a dead body and hung it by a rope. The *post mortem* examination showed that death was due to hanging.

It was held that the accused could not have intended to kill his wife, if he thought that she was already dead, and he could not be convicted of murder. The offence that the accused committed was an offence under Section 325 of having given her kicks, blows and slaps before she fell down.

(v) *Emperor v. Saber Ali Sarkar*, 57 Ind. Cas. 826 (1920).

Accused thrashed a young man who had approached his mistress. Deceased was weak and had an enlarged spleen.

Held that he should be convicted under Section 323.

D. The Madras High Court.

(i) *Reg. v. Acharjys*, 1 M. 224 (1877).

In the course of a dispute, the accused gave the deceased a severe push on the back which caused him to fall from the top of the steps to the road below, a distance of $2\frac{1}{2}$ cubits. In falling the deceased fractured his big toe, and on the fifth day after the fall the deceased died from tetanus brought on by the fracture. It was held that the conviction under Section 304 A was bad, and that the case was not one of culpable homicide not amounting to murder, because there was no likelihood of the result following, and *a fortiori* no design of causing it; as there was no positive act which directly caused the death, and as the act was not culpable homicide because no proper circumspection would have shown the accused that his act would cause death, the case was simply one of using criminal force.

(ii) *In re Daude Gangadu*, 1 Weir 299 (1881).

When, except the fact of death, there was nothing to show that the accused intended to cause death or grievous hurt, the death being caused by kicking the deceased, and no weapon having been used, it was held that under these circumstances, it would be safer to convict him of culpable homicide not amounting to murder.

(iii) *In re Midde Venkappa*, 1 Weir 299 (1881).

When the accused caught a boy stealing toddy, and being angry, struck the boy a blow on his forehead with a heavy stick he was carrying, and caused the boy's death, it was held that the accused should be convicted of culpable homicide not amounting to murder, inasmuch as it was doubtful whether the accused knew more than that a blow with such a stick and with the force used by him, was possibly dangerous to life.

(iv) *In re Thiagarayan*, 1 Weir 301 (1882).

The accused, when in a state of intoxication, produced by his own act, struck the deceased with a bamboo, thereby fracturing his skull, so that death resulted. It was held that the accused should be charged with culpable homicide not amounting to murder, and not with grievous hurt.

(v) High Court Proceedings, 27th August 1886, I Weir 300.

The presumption of law is that a man intends the natural and inevitable consequences of his own act. When the accused

took a stout bamboo stick, four feet long, and with it struck the deceased a furious blow on the head which fractured the skull, it was held that the accused should have known death to be a very probable result of the act committed by him and here his act clearly fell under the definition of culpable homicide punishable under Section 304.

It was further held that the Sessions Judge had committed an error of law in holding that the prisoner's state of mind, at the time, must be taken into consideration in determining the question whether the prisoner intended to cause injury which was likely to cause death or only to cause grievous hurt.

(vi) Queen-Empress *v.* Kalyani, 19 M. 356 (1896).

The accused, a woman of strong physique sitting upon the chest of her husband, a man in an extremely weak state of health, twisted and squeezed his testicles in such a manner as to reduce them to a pulpy condition, and the accused died from the injury caused to the testicles; it was held by two Judges that the accused was guilty of culpable homicide not amounting to murder inasmuch as the accused should be held to have known that the death would at all events be a probable, if not the most probable, consequence of her act. The third Judge held that the death was an unforeseen result of the act, and that the accused was guilty of an offence under Section 323.

(See 19 Bom. L. R. 823, wherein in a similar case the accused was found guilty under Section 323.)

(vii) Perumal Naiken *v.* Emperor, 193 M. W. N. 1912 = 13 Ind. Cas. 817 = 13 Cr. L. J. 129.

In the course of a murderous attack on his wife by the accused, the former ran to the deceased woman for protection and clasped her arms round her waist. The accused thereupon gave a fatal stab to the deceased with the sole object of making her let go his wife, so that he might wreak his vengeance on her.

The accused had no quarrel with the deceased and no intention of killing her. It was held by two Judges (the third dissenting) that the accused was only guilty of culpable homicide not amounting to murder, as he did not intend to inflict such injury on the deceased as was likely to cause her death or was sufficient in the ordinary course of nature to cause her death.

(viii) Syed Batcha Sahib v. Emperor 556 M. W. N.
1913=18 Ind. Cas. 675=14 Cr. L. J. 115.

A person who inflicts injury on the person of another which ends fatally and which the former should have known was likely to cause death is guilty of culpable homicide amounting to murder, though he had no wish to cause death or any motive to do so. The law will presume that the person inflicting the injury intended to cause death, and it lies on the offender to show that such was not his intention. When the accused in a drunken state stabbed his wife owing to her refusal to start with him for a certain place, which resulted in her death, and the injuries were such that the accused should have known that they were likely to cause death, it was held that the accused was guilty under Section 302 and not under Section 304.

(ix) Palani Goundan v. Emperor, 42 M. 547 F. B. (1919).

The accused struck his wife a blow on the head with a ploughshare which rendered her senseless. He believed her to be dead and, in order to lay the foundation for a false defence of suicide by hanging, proceeded to hang her from a beam by a rope which resulted in her death by asphyxiation.

"Causing death may be paraphrased as 'putting an end to human life,' and thus all three intentions must be directed either deliberately to putting an end to a human life, or to some act which to the knowledge of the accused is likely to eventuate in the putting an end to human life. The knowledge must have reference to the particular circumstances in which an accused is placed. No doubt if a man cuts the head off from a human body, he does an act which he knows will put an end to life, *if it exists*. But we think that the intention demanded by the section must stand in some relation to a person who either is alive or is believed by the accused to be alive. If a man kills another by shooting at what he believes to be a third person whom he intends to kill, but which is in fact the stump of a tree, it is clear that he would be guilty of culpable homicide. This is because, though he had no criminal intention towards any human being actually in existence, he had such an intention towards what he believed to be a living human being. The conclusion is irresistible that the intention of

the accused must be judged, not in the light of actual circumstances, but in the light of what he supposed to be the circumstances. It follows that a man is not guilty of culpable homicide, if his intention was directed only to what he believed to be a lifeless body.

Complications may arise when it is arguable that the two acts of the accused should be treated as being really one transaction, as in *Queen-Empress v. Khandu* (15 B. 194), or when the facts suggest a doubt whether there may not be imputed to the accused a reckless indifference and ignorance as to whether the body he handled was alive or dead, as in *In re Gour Gobindo Thakur* (6 W. R. Cr. 55).

The facts as found here eliminate both these possibilities and are practically the same as those found in *Emperor v Dalu Sardar* (18 C. W. N. 1279). We agree with the decision of the learned Judges in that case, and also with the clear intimation of opinion by Sargent, C. J., in *Queen-Empress v. Khandu*.

The accused therefore cannot be convicted either of murder or of culpable homicide, but he can of course be punished both for his wrongful assault on his wife, and for his attempt to create false evidence by hanging."

In the case cited, *In re Gour Gobindo Thakur* (6 W. R. Cr. 55), G G struck the deceased with a blow which knocked him down, and then he and others, without enquiry as to whether he was dead or not, in haste hung him up to a tree so as to make it appear that he committed suicide. The accused were all convicted of hurt but the High Court quashed the proceedings and directed the accused to be retried on charges of murder and culpable homicide not amounting to murder. Extracts from the judgments are given in the judgment of the Madras Full Bench, and it is noted that the Judges did not wish to decide the case, and therefore their language was hypothetical.

E. Punjab.

(i) Mahomed Khan and Fazal Khan v. Crown, 12 P. R. 1869.

Upon an inoffensive remark made by deceased F. K. picked a quarrel with him, and after some words had passed between the two, F. K. held the deceased's arm down by his side, while M. K. inflicted a stab which caused death.

It was held that the accused should have been convicted of murder.

(ii) Malli v. The Crown, 2 P. R. 1876.

The deceased woman gave abusive language to her husband. He enraged, gave her two blows over her head with a hatchet, each blow fracturing her skull. He must have known that death was likely to be the result; although there may have been no premeditation, it is out of the question to hold that the offender did not take undue advantage and did not act in a cruel and unusual manner. The offence clearly amounts to murder."

(iii) Rupa v. Empress, 29 P. R. 1889.

Accused and deceased had a quarrel of words. The deceased who was the stronger man came towards the accused in a menancing attitude with his shoes. Accused picked up an axe and struck three blows in the chest penetrating to the heart and causing instant death. It was held that the inference was inevitable that the accused intended to cause such bodily injury as was likely to cause death and that he was rightly convicted of murder; but commutation of sentence was recommended because as a case of murder his act has only just crossed the line dividing it from culpable homicide not amounting to murder.

(iv) Karam v. Queen-Empress, 5 P. R. 1893.

These cases when death is caused by a single blow given in anger on the impulse of the moment with a weapon not lethal in its nature are always difficult to decide. The question is one of fact always and not of law, as to the intention and knowledge with which the striker acted.

The accused caused the death of his wife by striking her on the head with a wooden *kharwanji* (stard on which

butter is churned). He admitted this himself and pleaded provocation having had a quarrel with the deceased in consequence of her having given one of their daughters to a man of whom the accused disapproved. It was held that it could not be safely found that there was anything more than knowledge that death was likely to result from such a blow; and the accused should be convicted under the second part of Section 304 (sentence five years).

(v) *Gujan v. Queen-Empress*, 18 P. R. 1893.

"Clauses 2 and 3 of Section 300 are mere amplifications of that part of Section 299, I. P. C., which speaks of an act done with the intention of causing such bodily injury as is likely to cause death."

(vi) *Queen-Empress v. C. Kelly*, 11 P. R. 1897.

The accused slapped his syce on the cheek with his open hand, and the syce fell, his skull was abnormally weak and was fractured by the fall, and the blow and fall which would have caused no serious injury to an ordinary man caused his death. There was no reason whatever to suppose that the accused had any reason for believing that the deceased was in the state of health described. It was held that, as the accused had done all he could for the widow, a sentence of 50 Rs. fine was adequate.

(vii) *Queen-Empress v. Saif Ali*, 17 P. R. 1898.

The accused was enraged by the abuse of the deceased and picked up a wooden lamp stand which was standing just inside the door and hit the deceased one blow on the skull and felled him, the deceased died five days after.

The accused was convicted under the second part of Section 304, and it was held there was no ground for enhancing the sentence of two years imprisonment.

(viii) *Bag v. The Emperor*, 29 P. R. 1902.

The accused was watching his field, the grain of which had on previous occasions been stolen; he saw the deceased cutting corn in it and gave chase, the deceased ran his head against a tree and fell; the accused hit him recklessly with a stick while on the ground and fractured his skull in two places.

The conviction was under the second part of Section 304.

It was held that the right of private defence had been exceeded and that the accused must have known that he was likely to cause death, but having regard to the facts that the night was dark, that only two blows were struck on the head, that the stick used was not proved to be a very formidable weapon, and that the appellant was naturally incensed at the loss caused to him, a sentence of one year was considered adequate.

(ix) *Rahmat v. The Emperor*, 30 P. R. 1902.

The accused quarrelled with his wife who was dilatory in the performance of her household duties, and exchanged abuses with her and gave her a blow with a heavy hammer which he picked up on the spur of the moment. From the effects of this blow she died.

Although a blow with such a weapon on the head delivered with violence might, if the striker realised the nature of the weapon, ordinarily be held to be delivered with the intention of causing death, the fact that the hammer was picked up on the spur of the moment goes far to destroy the presumption raised by the nature of the weapon. The accused did not intend to cause death, or such bodily injury as was likely to cause death, though he must have known he was likely to cause death. The conviction was therefore changed from one under Section 302 to Section 304, second part.

(x) *Gujjar v. Crown*, 12 P. R. 1911.

The accused broke into a dwelling house at night, and, in order to evade arrest, struck out wildly with a dangerous weapon regardless of the effect of his blow and by so doing caused the death of a child. It was held that by hitting out in all directions with a *gandasa* he did something which he knew to be likely to cause death to anyone upon whom the *gandasa* might fall, and the fact that he caused the death of a person whose death he never intended or knew himself to be likely to cause, merely brings the case within the provisions of Section 301, and that the conviction should have been under Section 304, second part.

(xi) *Kutab Ali v. The Crown*, 14 P. R. 1911.

A man who has either hacked a fellow creature about in a most merciless fashion or has practically pounded him to death

cannot escape conviction of murder merely by urging that he was careful to avoid injuring a vital part.

There were eight severe hatchet wounds on the face and it was held that there was a presumption that the wounds inflicted were intended to cause death or such injuries as were known by the offender or offenders to be likely to cause death.

(xii) Sundar Singh v. Crown, 6 P. W. R. 1912 = 68 P. L. R. 1912 = 15 Ind. Cas. 318 = 13 Cr. L. J. 478.

A sweeper had been appointed as a *rakha* by a Jat to watch his crops of grain, and on account of the former stealing the stuff, a quarrel ensued, and he was strangled to death by the latter. It was held that the culprit was guilty of an offence punishable under the second part of Section 304 and that a sentence of four years was adequate.

(xiii) Rahim Dad v. The Crown, 3 P. W. R. 1913 = 150 P. L. R. 1913 = 19 Ind. Cas. 715 = 14 Cr. L. J. 283.

The accused had two wives, the deceased elder wife was habitually ill-treated and starved by her husband, and at last was found suffering from a severe injury on the head from the effects of which she died three days after she was admitted to hospital. It was held that the presumption was that the injury was inflicted by the husband, and that to inflict such an injury on the head of a woman already reduced by ill-treatment to such a poor condition was an act which warranted the finding that the culprit must have known that it was likely that death would be the result, and was sufficient to bring him under Section 304, second part. A sentence of 10 years was not considered too severe.

(xiv) Muhamma d Ali v. The Crown, 5 P. W. R. 1913, N.-W. F. P.—157 P. L. R. 1913.

The accused after a trivial domestic quarrel beat his wife with a light stick with the result that she fell down and expired. The medical evidence showed that the deceased was a thin and poorly developed woman, that her brain was anaemic but otherwise all the internal organs were healthy and uninjured; no bones had been broken but there were many injuries on the body and death had been due to shock. The Sessions Judge held that the accused had beaten his wife most unmercifully and that he must

have known that by such beating he was likely to cause the death of a thin and weak woman such as his wife was, and he convicted him under Section 304 (2). It was held that as all the physical injuries were simple hurt, the conviction should be under Section 323, as the accused would not have known that the deceased's brain was anaemic or that the shock of a severe beating would prove fatal to her. An accused person should be convicted and punished for the hurt which he intended to cause or might reasonably be held likely to cause by the act done and not for an unforeseen result of that act.

(xv) Crown v. Nashkir, 7 P. W. R. 1913, N.-W. F. P. = 259 P. L. R. 1913.

The prisoner beat the deceased with a stick causing among other minor injuries the rupture of the spleen and of the liver and breaking the ninth and tenth ribs. The conviction was altered from one under Section 304 A to one under Section 304 (2).

(xvi) Kunda Singh v. Crown, 4 P. W. R. 1914=3 P. L. R. 1914=15 Cr. L. J. 178=22 Ind. Cas. 754.

When a person on the spur of the moment in the heat of passion and without any premeditation and motive for causing death, seizes a *chhavi*, the first weapon which came to his hands, and inflicts with it a blow on the head of another which results in the latter's death the former's act falls within the 2nd part of Section 304, but in such a case the culprit deserves the maximum punishment.

(xvii) Mt. Siriyan v. Crown, 69 P. L. R. 1916=17 Cr. L. J. 270=34 Ind. Cas. 990.

The deceased came with a pitchfork in his hand and abused the sister of the accused. The accused was provoked, and in a moment of anger and without premeditation, struck the deceased on the head, causing him a fatal injury, and the accused was convicted under Section 304, second part. It was contended in appeal that the accused acted in the exercise of her right of private defence, and in any case she could only be convicted of having caused grievous hurt. It was held that the right of private defence did not extend to the causing of death, but that the conviction could only be maintained for the offence of grievous hurt. As the facts did not show that the hurt was caused with the knowledge

that it was likely to cause death, the act did not amount to culpable homicide.

(xviii) *Jahana v. Crown*, 109 P. L. R. 1916 = 45 P. W. R. 1916 = 36 Ind. Cas. 131.

It was proved that Jahana struck the first blow on deceased's head with a *pahaura*, a formidable weapon, and his conviction under Section 304, second part, was upheld, because he must have known that death would very likely ensue from a blow on the head struck with the weapon he yielded.

F. urma.

(i) Nga Shwe Po v. Queen-Empress, L. B. R. 1872-1892, 179.

The accused person struck a man one blow on the head with a bamboo yoke and the injured man died afterwards in hospital, principally from the excessive use of opium surreptitiously administered by his friends. It was held that as there was no intention to cause death, and as the blow itself was not of such a nature as was likely to cause death, the offence committed was that of voluntarily causing grievous hurt. If the immediate cause of death be the improper administration of dangerous drugs, then the persons who administered such drugs without any excuse are the persons who "caused the death."

(ii) Nga Shwe Tha', L. B. R. 1872-1892, 271.

The accused in the course of a struggle with the deceased, who was unarmed, drew his clasp knife and stabbed the deceased in the chest; the wound was three inches deep, penetrated the cavity of the chest and injured the lungs. The deceased died after being in hospital for twenty-four days.

It was held that the accused was guilty of murder.

(iii) Mi Ni v. Queen-Empress, L. B. R. 1872-1892, 300.

A person who causes death by stabbing with a knife in such a way that the knife penetrates the cavity of the chest of the person stabbed must be presumed to have known that he was likely by his act to cause death, and such a person should at least be found guilty of culpable homicide not amounting to murder.

(iv) Nga Sanya v. Queen-Empress, L. B. R. 1872-1892, 463.

When the accused in the course of a quarrel stabbed the opponent in four places from which he died, it was held that in the absence of any evidence to show the character of the wounds inflicted and whether death was the probable result of the wounds, the accused could not be convicted of culpable homicide, but should have been convicted of voluntarily causing grievous hurt with a dangerous weapon.

(v) QueenE-mpress v. Nga Thet, L. B. R. 1872-1892, 508.

When a person acts under some provocation, not being grave and sudden, and strikes a person one blow with a heavy

club, from which the person dies within 24 hours due to compression of the brain, it was held that he should have been convicted of culpable homicide not amounting to murder.

(vi) *Queen-Empress v. Nga Kyin*, U. B. R. 1892-1896, Vol. I, 217.

If there is nothing to show that the accused was rash, and death resulted from the rupture of a greatly enlarged spleen caused by a slight kick with a bare foot, no offence is committed except that of voluntarily causing hurt.

(vii) *Hla Tun v. Queen-Empress*, L. B. R. 1893-1900, 452.

In order that culpable homicide may amount to murder under Section 300 (3), the prosecution must prove that the accused intended to cause such bodily injury as is sufficient in the ordinary course of nature to cause death. Because the bodily injury caused resulted in death in the ordinary course of nature, it does not necessarily follow that the accused intended to cause such bodily injury. Presumption of intention must depend on the facts of each particular case.

(viii) *Kwinya v. Queen-Empress*, L. B. R. 1893-1900, 459.

When a person without necessity went out on the road armed with a knife, uttering a challenge to fight and, on the fight beginning, used his knife so as to cause the death of his opponent, it was held that he had committed murder, although the accused might have been, until the fatal blow was struck, equally to blame in the matter of provocation.

(ix) *Nga Po Tin v. Queen-Empress*, U. B. R. 1897-1901, Vol. I, 293.

When there is no intention of causing death and when there is also not sufficient ground for presuming that the accused intended to cause such bodily injury as was likely to cause death or knew that his act was likely to cause death, the conviction should be for voluntarily causing grievous hurt under Section 325.

(Reference was made to *Nga Soya v. Queen-Empress*, U. B. R. 1892-1896, Vol. I, 211, wherein it was laid down that an intention to kill cannot be inferred when it is not proved. That the accused knew he was likely to cause death may be inferred and if the accused knew that he was likely to cause death, then his act comes within

the definition of Section 299 and not within that of Section 302, and therefore Section 304 is the only section applicable.

(x) *Hamid v. King-Emperor*, 2 L. B. R. 63 (1903).

Any act of stabbing into what are ordinarily considered to be vital parts of the body *prima facie* falls within Section 300 (3). The intention with which such an act is done must be gathered from the act itself, and if a person strikes another in a vital part with a cooking instrument, it must be held that the striker's intention is to cause such bodily injury as is sufficient in the ordinary course of nature to cause death.

(xi) *Shwe Hla U. v. King-Emperor*, 2 L. B. R. 125 = 1 Cr. L. J. 184 (1903).

A man's intention can only be gathered from his acts. Death from a blow or blows on the head is probably, as a rule associated by people unskilled in medical science only with the breaking of the skull. Ignorance of the actual causes which may bring about another's death in consequence of a blow cannot affect the question of the striker's knowledge and intention when striking the blow. If actual knowledge and experience do not do so, instinct at least tells every man that to hit another human being violently on the head may possibly result, or is likely to result, or will probably result in serious injury to the person struck, but knowledge, belief, or expectation of the amount of injury that may be caused must depend upon what is used in inflicting the blow and the force with which the blow is delivered. A man is presumed by law to intend the ordinary and natural consequences of his acts. Every man giving another a violent blow on the head with his fist must be taken to know that the result of his blow *may be* and even *is likely to be* injury to the other sufficient to kill him, but, unless it must be taken that ordinary knowledge, experience, or instinct tell a man that such a result is an ordinary and therefore a probable consequence of so striking another man, the striker's act would not amount to a greater crime than culpable homicide, for, at the most, it would be done with the knowledge that he was only likely to cause death, and an intention to cause more than he knew was likely cannot be imputed to him, unless there was further evidence showing what his actual intention was.

Every man must be taken to know that, if he repeats violent blows with anything substantial and hard on another

man's head, he will probably either kill the man such injury as is sufficient in the ordinary course of nature to cause death. The repetition of the blows takes the case beyond the limits of culpable homicide into those of murder.

(xii) *Shwe Ein v. King-Emperor*, 3 L. B. R. 122 = 3 Cr. L. J. 355 (1905).

The accused struck a blow with a piece of wood picked up on the spur of the moment during a heated altercation. The circumstances did not warrant the conclusion that the accused actually intended to kill the deceased nor did the act itself call for such a conclusion. The decision of the question, it was held, whether the act of the accused amounts to murder or not must rest upon whether he must be held to have intended to cause bodily injury sufficient in the ordinary course of nature to cause death, or whether he only intended to cause such bodily injury as was likely to cause death. Under the circumstances the second clause of Section 300 has no application and the decision must be based on a consideration of the third clause of that section. The lower Court not having found that the appellant intended to cause such bodily injury as was sufficient in the ordinary course of nature to cause death, he must be acquitted of the charge of murder and should be found guilty of culpable homicide not amounting to murder under Section 304, inasmuch as he culpably caused the death of the deceased by an act done with the intention of causing such bodily injury as was likely to cause death.

(xiii) *Nga Maung v. King-Emperor*, 4 L. B. R. 132 = 7 Cr. L. J. 410 (1907).

The second clause of Section 300 only applies in special cases in which the person injured was in a condition or in a state of health in which an injury which would not ordinarily cause death would cause his or hers, and the person who caused the injury knew, when inflicting such an injury, that owing to the condition or state of health of the person he was about to inflict the injury to, he would be likely to cause the person's death.

(xiv) *Ban U. v. King-Emperor*, 4 L. B. R. 367 = 9 Cr. L. J. 364 (1908).

The accused rushed wildly into a house and without considering the consequences attacked his mother-in-law, a woman of fifty-five, with a *da* and by mistake cut another woman of

sixty-one on the arm, who died of the shock caused by the cut. The wound was not such as would ordinarily cause the death of a woman of that age. Nor did the accused know of any weakness or defect in the person to whom the harm was caused which would render her likely to be killed by such an act. It was held that as the accused did not act with the intention specified in the second clause of Section 300 or with the intention specified in Section 299 but only with a knowledge that he was likely by his act to cause death, he committed culpable homicide not amounting to murder.

(xv) *Po Sin v. King-Emperor*, 5 L. B. R. 80 = 10 Cr. L. J. 359 = 3 Ind. Cas. 710 (1909).

Apart from cases falling under Section 300, clause 2, if from the intentional act of injury committed, the probability of death resulting is high, the finding should be that the accused intended to cause death or injury sufficient in the ordinary course of nature to cause death, and the conviction should be of murder unless one of the exceptions applies; if there was a probability in a less degree of death ensuing from the act committed, the finding should be that the accused intended to cause injury likely to cause death, and the conviction should be of culpable homicide not amounting to murder (referring to 3 L. B. R. 122).

(xvi) *Nga Po Lu v. Emperor*, Bur. L. T. 253 = 12 Cr. L. J. 524 = 12 Ind. Cas. 292 (1911).

When a person when drunk, struck another on the head with a billet of wood which dazed him and immediately after struck a third person, in consequence of which blow that person died at once, it was held that the accused must be deemed to have intended to cause an injury to the deceased which he knew would be likely to cause death but it was not necessary to impute to him the intention of causing an injury which in the ordinary course of nature would cause death (follwing 3 L.B.R. 122).

(xvii) *Kya Nyun v. King-Emperor*, 8 L. B. R. 125 = 17 C. L. J. 154 = 33 Ind. Cas. 634 (1916).

When an accused is charged with murder and the jury find that the accused caused the injuries which resulted in death, they should be directed to find with what intention the accused caused the injuries. If the jury should find that the accused stabbed with the intention of causing such bodily injuries as were likely to cause death,

the offence would amount to culpable homicide not amounting to murder, punishable under the first part of Section 304 (reference to 3 L. B. R. 122).

(xviii) *Maung Aung Tum v. Emperor*, 17 Cr. L. J. 544 = 36 Ind. Cas. 592 (1916).

When it was found that the accused caused the death of the deceased by stabbing him with the intention of causing such injury as was likely to cause death, the most that the accused could be convicted of on such finding was culpable homicide not amounting to murder.

(xix) *Nga Tun v. Emperor*, 17 Cr. L. J. 335 = 35 Ind. Cas. 511 (1916).

As explained in *Shwe Ein v. Emperor*, 3 L. B. R. 122, the second part of Section 304 refers only to cases in which the offender has no intention of injuring any one in particular.

(xx) *Nga Po Tha v. Emperor*, 3 U. B. R. (1917) 54 = 19 Cr. L. J. 375 = 44 Ind. Cas. 679.

The accused, believing the deceased to be possessed by an evil spirit, beat her to death in the hope of curing her. The deceased protested that she was not possessed, and did not consent to be beaten. It was held that the accused was guilty of an offence under the second part of Section 304.

Nga Po Kyaw v. King-Emperor, U. B. R. (1902-1903) 1, was distinguished because in that case the girl's mother and her relatives contemplated that she should be beaten, and the girl herself voluntarily submitted to that treatment. The girl had been suffering from hysteria for some years, and among her own people she was universally believed to be under the direction of an evil spirit. In the present case there was no evidence that the girl was suffering from anything but an ulcer on the leg; and it was held that the fact that the deceased did not consent to be beaten made Section 304 A inapplicable.

If there was no intention to cause death or knowledge that death would ensue, the appropriate section would appear to be Section 325; if there was, the question is whether Section 302 or 304 applies.

The deceased had been slapped and kicked, tied by a rope lifted and dropped on the ground. Each of the blows struck by the accused was comparatively light, and the prevailing intention throughout would seem to have been to drive out the spirit but the deceased was elderly and weakly and therefore the accused must have known that the treatment was likely to cause death. He was convicted under Section, 304, second part.

G. Patna High Court.

(i) Mato Ho *v.* Emperor, 57 Ind. Cas. 171.

The accused, a member of an aboriginal tribe, killed a woman under the impression that she was a witch, and was responsible for the illness of his wife and daughter. The facts showed that he was not labouring under any hallucination, but that he knew he was killing a human being, and also that he was aware of the nature of his act.

It was held that he was rightly convicted of murder.

It was further held (following Queen *v.* Ooram Sungra 6 W. R. 82 Cr.), that the sentence in such a case should be transportation for life,

H. Other Rulings.

(i) King-Emperor v. Behram, 1 S. L. R. 1=9 Cr. L. J. 245.

The accused took up a wooden pestle and gave a blow with it to the deceased, killing him, and the circumstances indicated that the blow was the unpremeditated outcome of a sudden quarrel and that, though a reasonable man must have known that it was likely to cause death, the probability of a fatal result was not present to the consciousness of the accused at the time. Held that the offence was punishable under Section 304 (2).

(ii) Queen v. Beshore Bewa, 18 W. R. Cr. 29.

The accused with no intention of doing anything more than chastise a disobedient and impertinent child, her daughter, struck her on the head and face and kicked her on the back. The child fell down senseless. The accused thinking the child was dead buried the body. Held that the conviction should be under Section 323.

(iii) Queen v. Punchanun Tantee, 5 W. R. Cr. 97, Queen v. Bysagoo Noshyo, 8 W. R. Cr. 29.

Death consequent upon disease of spleen, convictions of voluntarily causing hurt.

(iv) Empress v. Jawahir, 5 C. P. L. R. Cr. 41.

When the medical evidence was that had the deceased not been suffering from a diseased liver he would not have died, and there is no evidence that the internal weakness was manifested by any outward signs or that the deceased seemed other than a man of ordinary strength, it was held that the accused should be convicted of causing grievous hurt, and not of culpable homicide not amounting to murder.

(v) Imperator v. Ismail, 11 S. L. R. 79=19 Cr. L. J. 19=44 Ind. Cas. 335 (1918).

Explanation 1 of Section 299 assumes that the bodily injury was inflicted with the intention of causing death or the knowledge that it would be likely to cause death. It was only intended to repeat the English rule that an injury which accelerates the death of a dying man is deemed to be the cause of it; and when death has been caused, it is no defence that the deceased was suffering from a complaint which would have caused his death in any event.

Section 300 (2) makes it clear that the offender is not responsible for death in such a case, unless he knew that the condition of the deceased was such that the act was likely to cause death.

Therefore as it was not suggested that the accused knew that the deceased was suffering from heart disease; and when he assaulted him he had no intention either to cause death or to cause such bodily injury as was likely to cause death, it was held that the offence did not fall under Section 299 but under Section 323.

(vi) *In re Magenée Behara*, 11 W. R. Cr. 33.

Certain persons, whom the accused, a ferryman, was rowing across a river, were drowned by the sinking of the boat which was an old one with holes in it over which planks had been nailed.

It was held that the accused could not be convicted of culpable homicide not amounting to murder, unless it could be shown that he acted with the knowledge that he was likely to cause death by taking them in the boat.

(See similar cases under Chapter IV, "Acting Rashly or Negligently")

GENERAL REMARKS.

It is undisputed that the first clauses of Sections 299 and 300 correspond, and that a man who causes death by doing an act with the intention of causing death must always be held guilty of murder unless one of the exceptions applies. Intention can either be proved as a fact by evidence of the conduct of the offender before, at, or after the occurrence, or by his written or spoken words; or it can be inferred from the nature of the assault.

The question whether or not the second clause of Section 299 corresponds with the second and third clauses of Section 300 has already been discussed in the first chapter.

Section 299 (c) and Section 300 (4).

It is necessary now to consider the scope and applicability of the third clause of Section 299 and the fourth clause of Section 300. Both these clauses are parallel. The former deals with an act done by a person with the knowledge that he is likely to cause death; and the latter refers to an act done by a person who knows that it is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death; and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid. The fourth illustration of Section 300 refers to a person who without any excuse fires a loaded cannon into a crowd of persons and kills one of them.

Mr. Justice Melvill in *Reg. v. Govinda*, 1 B. 342, wrote:

"(c) and (4) appear to me intended to apply (I do not say that they are necessarily limited) to cases in which there is no intention to cause death or bodily injury. Furious driving, firing at a mark near a public road, would be cases of this description. Whether the offence is culpable homicide or murder, depends upon the degree of risk to human life. If death is likely to result it is culpable homicide; if it is the most probable result it is murder."

Mr. Justice Fox in Shwe Ein's case, 3 L. B. R. 122, went further and held the opinion that in a case in which bodily injury intended for a particular individual has resulted in death, these parts of the sections need not be considered.

I cite the following extract from his judgment:—"The distinctions between the two offences of murder and culpable

homicide are most clearly set out in the judgment of Melvill J. in *Reg. v. Govinda*. I accept the learned judge's view as correct in every detail, but would add that the cases stated in Section 299 and Section 300, in which "knowledge" is made the determining constituent of the offence, appear to me to refer to cases in which the doer of the act constituting the crime had no intention of injuring anyone in particular, but in which he has caused death by doing a reckless or rash act, which he must have known would be likely to endanger human life. The fourth clause of Section 300 must, I think, be read as a whole, and the last words of it, *viz.*, 'and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid' appear to me to show that the clause was intended for a case of the nature I have referred to above. Illustration (d) of the section strengthens this view. The Code affords no good illustration of an offence of culpable homicide not amounting to murder by an act done with the knowledge on the part of the doer that he was likely to cause death but without the intention of causing death or bodily injury likely to cause death. Part of illustration (a) to Section 299 covers such a case. To illustrate my view of a crime falling within this category, I venture to offer the following illustration:—The engine-driver of a railway passenger train, noting a danger signal against him but seeing no signs of danger on the line ahead of him, runs his train past the danger signal with the consequences that the train is upset and lives are lost. The engine-driver's offence might not be held so culpable as to fall within the fourth clause of Section 300, but it might clearly be a case punishable under the last part of Section 304."

This theory was accepted also in the following rulings:—

(a) *Jhagru Gond v. Emperor*, 1 N. L. R. 134=2 Cr. L. J. 746.

"The fourth clause of Section 300 is intended primarily and especially to apply to cases, in which there has been no intention to cause death or bodily injury to any specific individual.

(b) *Nga Na Ban v. King-Emperor*, U. B. R., 1906, Penal Code, 33=5 Cr. L. J. 306.

"The last clause of Section 299 and the fourth clause of Section 300 must be confined to cases where no intentional injury has been caused.

(c) Emperor v. Kotiya. 15 Cr. L. J. 513=24 Ind. Cas. 601 (Burma) 1914.

"The parts of Sections 299, 300, 304 dealing with knowledge are not applicable to a case in which bodily injury intended for a particular individual has resulted in death; when a death has been caused by intentional bodily injury inflicted on the deceased, the question of what knowledge must be attributed to the accused comes in only as a means of arriving at his intention when he committed the act, and for that purpose and not for the purpose of deciding whether the case falls within the last part of Section 304 must the question be considered."

(d) Saidino v. Emperor, 30 Ind. Cas. 998=9 S. L. R. 99=16 Cr. L. J. 710 (1915).

"We do not think that Section 300 (4) applies to cases where there is an intention to cause bodily injury to any particular person. It refers primarily to cases where there is no such intention, but the accused has knowledge that the act involves imminent risk of human life; according to the degree of the risk, the offence is either culpable homicide not amounting to murder under Section 299 (c) or murder under Section 300 (4). We differ from the case of Hanuman v. Emperor, 35 A 560, where Section 300 (4) was applied to a case similar to the present." (The facts were that four accused had attacked the deceased with *lathis* and beaten him with such brutality that he died.)

Mr. Mayne in his Criminal Law of India (para. 431) writes that a common type of cases coming within clause 3 of Section 299 is that of those brutal assaults made without any deadly weapon but with a violence likely to endanger life which do in fact end fatally. He cites two rulings, Reg. v. Govinda, 1 B. 342; and Reg. v. Kaliani, 19 M. 356.

The former ruling is not applicable, as the conviction in that case was under the first part of Section 304 and the punishment was *transportation* for seven years.

In the Madras case death resulted from the squeezing of testicles but in an exactly similar case the Bombay High Court held (as had been held by one Judge in the Madras Case) that the accused was guilty under Section 323.

As a matter of fact there are very few rulings in which the second part of Section 304 has been applied in cases of intentionally and deliberately inflicted injuries (*vide also* cases

cited under the next heading and general remarks thereunder); but there is undoubtedly a tendency among Lower Courts to apply this clause to such cases.

It was applied by the Calcutta High Court in Ketaudi Mundul's case (4. C. 764). Therein death was caused by a kick on the abdomen of a girl of sufficient force to cause rupture. In such a case it might be held that there was no deliberate intention to cause bodily injury, but to kick at the abdomen of a girl was an act likely to cause death.

Therefore, although death was caused by direct violence, such a case might be an exception to the theory which is being discussed.

A similar case was Daude Gangadu, 1 Weir 299.

Nga Po Tha's case, 3 U. B. R. (1917), 54, may also be brought under this category on the ground that it was the general treatment of the deceased, designed to expel an evil spirit, and not the individual injuries, which were slight, that had to be considered.

A good example of a case in which this clause is undoubtedly applicable is Gujjar v. Crown, 12 P. R. 1911, wherein the accused struck out wildly in the dark with a *gandasa* and killed a child. There was no definite intention to cause injury likely to cause death, but there was knowledge that by the act of striking out in the dark, it was likely that death would be caused to anyone whom the *gandasa* might happen to strike.

An offence under 299 (3) is punishable under the second part of Section 304, which runs:— "if the act is done with the knowledge that it is likely to cause, death, *but without any intention to cause death or to cause such bodily injury as is likely to cause death.*" The words in italics are important. Intention must be expressly negatived. When deliberate injury is caused to a particular person, it seems illogical to say that the offender knew that his act was likely to cause death, but did not intend to inflict a bodily injury which was likely to cause death. His act is the intentional infliction of a bodily injury, and it is the bodily injury which causes death.

For instance, if a person is beaten deliberately by one or more persons with fists or sticks, and death results from these injuries, it cannot be said that it was the act and not the injuries that caused death; and if it was known to the

assailants that their act was likely to cause death, it must have been known that the injuries which they were intentionally inflicting were likely to cause death. Therefore (if there is no distinction between the second clause of Section 299 and the second and third clauses of Section 300), in such a case the offence would be murder.

If there is no knowledge that the injuries which are intentionally inflicted are likely to cause death, and the injuries are not sufficient in the ordinary course of nature to cause death, but death results on account of some disease or some particular circumstances unknown to the offender, then he would be guilty only under Section 323 or Section 325, according to the extent of injury he intended to cause (*vide* 2 A. 522, 3 A. 597, 11 P. R. 1895, 112 A. W. N. 1881, 5 P. W. R. 1913, N. W. F. P., 57 Ind. Cas. 826, Calcutta).

A distinction has, however, been drawn by all Courts between a case in which a blow has been deliberately given, and a case in which the offender is excited by sudden anger. In the latter class of cases, it has been generally held that the second part of Section 304 is applicable, the theory being that when a man picks up a weapon on the spur of the moment and strikes another in sudden anger, he does not realise the nature of the weapon or of the injury which he is inflicting though he cannot be absolved of all knowledge that he is doing an act which is likely to cause death. *Rahmat v. The Emperor*, 30 P. R. 1902, is a general instance of such a case; and other instances are *Karam v. Queen-Empress*, 5 P. R. 1893; *Queen v. Saif Ali*, 17 P. R. 1898; *Kunda Singh v. Crown*, 4 P. W. R. 1914; *Midde Venkappa*, 1 Weir 299; *Bag v. Emperor*, 29 P. R. 1902; *Queen-Empress v. Nga Thet* L. B. R. 1872-1892, 508; *Emperor v. Behram*, 1 S. L. R. 1.)

The question was discussed in full in *Emperor v. Sardar Khan*, 41 B. 27, and it appears that the second part of Section 304 was applied only after great hesitation; the blow in that case was delivered after the accused had had time to cool and when the deceased's back was turned; and this case represents the extreme limits within which this second part of Section 304 can be applied in such cases. 11

An analogous case is *Perumal Naiken v. Crown*, 193 M.W.N. 1912, where the accused struck at a woman for the sole purpose of making her let go his wife who had run to her for protection.

The application of this clause in *Sundar Singh v. Crown*, 6 P.W.R. 1912 and in *Jahana v. Crown*, 109 P. L. R. 1916, cannot easily be reconciled with the theory that it is not applicable to cases of direct and intentional violence. In the former case the accused strangled to death his *rakha* with whom he had quarrelled for stealing his crops. The latter case belongs really to the next class, as there was an assault by more than one person; but the one assailant who delivered the blow on the head was specially punished. This was hardly a case of a person picking up a weapon on the spur of the moment and not realising its nature; and if he intentionally inflicted a blow on the head of the deceased, and knew that death would very likely ensue from such a blow, his act looks very like murder, unless one of the exceptions could have been applied.

In *Emperor v. Rama* 42 A. 302, a case of a deliberate assault, it was held that the offence fell either under Section 304 (2) or Section 325, but there was no final decision between these two sections, and gangrene had supervened.

This clause was applied in *Queen-Empress v. Kangla*, 163 A. W. N. 1898, to a case where the accused killed a man with a *lathi* under the *bona fide* belief that the object at which he struck was not a human being but something supernatural. It seems doubtful whether a conviction for culpable homicide not amounting to murder was justified; if the belief of the accused was *bona fide*, there could be no knowledge that he was likely to cause death.

The facts in *Empress v. Hayat*, 11 P. R. 1888, were similar; the accused entertained a belief that a stooping child whom he caught sight of in the early gloaming was a spirit or demon, the child being in a place which the villagers deemed to be haunted. The Sessions Judge convicted under Section 304-A., and the Chief Court declined to interfere on revision; and it was noted that the conviction could be upheld on the ground that though the prisoner was under a mistake of fact, he did not in good faith, that is with due care and attention, believe himself justified in doing the act. The question whether Section 304-A. or 304 (second part) was applicable was not considered.

A similar case was *Nga Shwe In v. Queen-Empress*, L. B. R. 1893—1900, 221, where a conviction under Section 304-A. was upheld. These rulings will be referred to in Chapter IV.

The Court of Lower Burma in *Ban U v. King-Emperor*, 4 L. B. R. 367, applied the second part of Section 304 to a case where the accused, while attacking one person with a *da*, by mistake cut another woman on the arm, and the woman, being old, died of the shock. Here the injury was not by itself sufficient to cause death, but the uncontrolled use of the *da* was an act likely to cause death.

Section 300 (4).

The question of the applicability of the fourth part of Section 300 is rather more obscure, as there is no specific direction (such as occurs in the second part of Section 304) that all intention must be expressly negatived. It would, however, seem logical to argue that this clause is merely an amplification of the third part of Section 299, referring to offences falling under that clause in which the probability of death resulting is so great that the offence becomes murder; and that if intention must be expressly negatived before 299 (c) can be applied, it must also be negatived if 300 (4) is to be applicable.

The difficulty of supporting the theory that this fourth part of Section 300 cannot be applied to a case of a deliberate and intentionally inflicted injury, is that it has been so applied by the Calcutta and Allahabad High Courts.

In *Kanhai v. King-Emperor*, 35 A. 329 (1913), four persons armed with *lathis* attacked and severely beat a fifth, with the result that he died, and in *Hanuman v. King-Emperor*, 35 A. 560 (1913) five men armed with *lathis* beat an unarmed man. (These cases really belong to the next class, and are cited thereunder).

In the former case it was found that the intention of the accused was to inflict such bodily injury as was likely to cause death; in the latter case, it was held that all the accused must be taken to have had the knowledge that their act must in all probability cause death, but at the same time it was written that the intention of each assailant could only be inferred from the reasonable and probable result of their acts and conduct.

It would appear that in both of these cases the conviction could have been under one of the other clauses of Section 300; and as the actual question of the scope and applicability of the fourth clause was not considered, it may perhaps be urged that these cases cannot be taken as definite decisions

against the theory advanced. In a more recent Allahabad case *Garib v. Emperor*, 17 A. L. J. 985 = 53 Ind. Cas. 495, 1919), in which two accused, who had brutally assaulted and killed an unarmed man, were convicted of murder, it was written that the accused must have known that their act was so imminently dangerous that it must in all probability cause death.

The Judicial Commissioner of Sind in Saidino's case, 9 S. L. R. 99, disagreed with the finding in Hanuman's case.

The Calcutta High Court applied the clause in *Reaz-ud-din Shaikh v. Emperor*, 11 Cr. L. J. 295 = 6 Ind. Cas. 251 (1910), (one Judge out of three dissenting). The accused went without legal excuse to a certain land in the possession of the party of the deceased, armed with dangerous weapons, to enforce their right or supposed right, and a fight ensued, and the injuries inflicted, though not premeditated, resulted in the death of the accused.

This appears to be the only case of this nature in which this clause has been applied.

There are two cases of the Punjab Chief Court in which this clause has been applied to a deliberate attack ; but they are not exactly similar to the Allahabad and Calcutta cases. In *Azim v. The Empress* (23 P. R. 1890, Cr.) the accused, after beating the deceased, had dragged him along with a ligature round his neck ; and it was held that the act of strangulation was murder because those persons who were engaged in it must either have intended to cause death or they must have known that it was so imminently dangerous that it would in all probability cause death and they had no excuse whatever for committing it.

In *Pal Singh and Surain Singh v. Crown*, 28 P. R., 1917, two drunken men assaulted the deceased with *lathis* without any direct motive and beat him to death.

Section 86 of the Penal Code allows to a drunken man the same knowledge as a sober man but does not necessarily give him the same intent. It was held in this case that when two men set on a third and beat him violently and brutally, there can be no doubt that their act was so imminently dangerous as was likely to cause death and would fall under Section 300 (4). As a general principle, this is hardly in consonance with the

dictum in *Nawab v. Crown*, 31 P. R. 1914, that the cases in which the fourth clause of Section 300 has any application are extremely rare, as such cases are very common. But the case may be distinguishable by the fact that the accused were intoxicated.

The clause has been applied by the Allahabad and Punjab Courts to cases of poisoning, *Emperor v. Gauri Shankar*, 40 A. 360 (1918); *Emperor v. Gutali*, 31 A. 148 (1909); *Lala v. Crown*, 32 P.L.R. 1911=12 Cr. L.J. 125=9 Ind. Cas. 731 (*vide* Class III).

The difficulty of the question arises from the apparent reluctance of the framers of the Code to be too rigid in their definition.

No doubt a deliberate and brutal assault on an unarmed man can be called an act which is so imminently dangerous that it must in all probability cause death; but if the other clauses of the Section can be applied to such cases, it would be less likely to encourage the loose application of this clause by lower Courts, if it were restricted to such special cases as that in illustration (d). It is difficult to imagine a case in which direct blows could be given with a knowledge that the blows were so imminently dangerous that they must in all probability cause death or a bodily injury likely to cause death without at the same time inferring from the nature of the blows an intention to cause such bodily injuries as were sufficient in the ordinary course of nature to cause death. As was pointed out in *Ghufar v. Empress*, 60 P. R. 1887, the intention spoken of in Section 300 does not require some design or fore-thought of murder. It is actual intention, the existing intention of the moment, and is proved by or inferred from the acts of the accused and the circumstances of the case. In such cases, therefore, there would ordinarily be such an intention as would bring the crime within the third clause of Section 300.

Section 301; causing death of person not intended.

Section 301 applies only to cases in which a person does something which he intends or knows to be likely to cause death. It could not, therefore, apply to a case in which the death of a child is caused by mistake in an attack on another person with a weapon that was not lethal. In such a case the

conviction would be under Section 325 as in Queen-Empress *v.* Budhiya, Rat. Ur. Cr. C. 398; Empress *v.* Sahae Rae, 3 C. 623; or under Section 323, as in Chatur Natha *v.* Emperor, 21. Bom. L. R. 1101. In Emperor *v.* Mardan Singh, 14 C. P. L. R. 126, it was held that when, in the course of a dispute, the accused struck at J. and J. avoided the blow which fell on a bystander and fractured his skull, the nature of the offence committed should be decided upon a consideration of the intention and knowledge of the accused as to the probable effects of his act.

In Jama *v.* Empress, 28 P. R. 1888, when the accused aimed a blow at a man with a *parani* and killed a child whom that man was carrying, he was convicted under Section 304 A.

Causing death.

Before there can be a conviction under Section 302 or Section 304, it is necessary to prove that death was the direct result of the action of the accused.

When death resulted from tetanus brought on by a fall resulting from a push by the accused, it was held in Reg. *v.* Acharjys, 1. M. 224, that the accused could only be convicted of using criminal force.

In the case of Nga Shwe Po, L. B. R. 1872—1892, 179 the principal cause of the death was the excessive use of opium surreptitiously administered to the deceased by his friends after his admission into hospital; and the accused was convicted only of causing grievous hurt.

In Crown *v.* Nuro, 7 S. L. R. 83=15 Cr. L. J. 376=23 Ind. Cas. 744, the deceased after a savage attack on him suffered continuously from high fever for forty days at the end of which period blood poisoning developed, followed on the next day by symptoms of brain fever; on the next day he died; it was held that the wounds were the cause of his death.

According to Explanation 2 of Section 299 when death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment, the death might have been prevented.

Before, however, the person who caused the injury can be found guilty of culpable homicide, it is necessary at least to prove that he did the act with the intention of causing an injury as was likely to cause death or with the knowledge that he was likely by that act to cause death. Therefore, as is pointed out in *Laik Singh v. Emperor*, 17 A. L. J. 56, a man who in the course of a trifling struggle is found to have inflicted a slight cut or abrasion on the finger of another man, which being neglected became infected in some manner so as to induce tetanus, can scarcely be held to have caused the death of the other; or at any rate the Court may conclude that the injury to which the deceased eventually succumbed was not inflicted with such intention or knowledge, as to bring the case within the definition of culpable homicide.

A man may be held to have "caused the death of another" if that other dies as the result of an injury, although by an operation or proper treatment, his life might have been saved; but before he can be found to have committed the offence of culpable homicide, there must be such intention or knowledge as is defined in Section 299; and it would only be in very rare cases that such intention or knowledge could be imputed, if the injury was not primarily of a dangerous character.

The original framers of the Code in Note M discuss the term "cause death" at some length. "We long considered whether it would be advisable to except from this definition any description of acts or illegal omissions on the ground that such acts or illegal omissions do not ordinarily cause death or that they cause death very remotely. We have determined, however, to leave the clause in its present simple and comprehensive form. There is undoubtedly a great difference between acts which cause death immediately and acts which cause death remotely; between acts which are almost certain to cause death, and acts which cause death only under very extraordinary circumstances. But that difference, we conceive, is a matter to be considered by the tribunals when estimating the effect of the evidence in a particular case, not by the legislature in framing the general law. It will require strong evidence to prove that an act of a kind which very seldom causes death or an act which has caused death very remotely has actually caused death in a particular case. It will require still stronger evidence to prove that such an act was contemplated by the person who did it as likely to cause death. But if it be proved

by satisfactory evidence that death has been so caused and has been caused voluntarily, we see no reason for exempting the person who caused it from the punishment of voluntary culpable homicide."

The proposal is then noticed of Mr. Livingston to exempt from the definition of homicide cases in which death is produced by the effect of words on the imagination or the passions.

"The reasonable course in our opinion is to consider speaking as an act..... .There will indeed be few homicides of this latter sort..... It would be most difficult to prove to the conviction of any Court that death had really been the effect of excitement produced by words. It would be still more difficult to prove that the person who spoke the words anticipated from them an effect which, except under very peculiar circumstances, no words would produce. Still it seems to us that both these points might be made out by overwhelming evidence; and supposing them to be made out, we are unable to perceive any distinction between the case of him who voluntarily causes death in this manner, and the case of him who voluntarily causes death by means of a pistol or a sword.

"Again, Mr. Livingston excepts from the definition of homicide the case of a person who dies of a slight wound which, from neglect, or from the application of improper remedies has proved mortal.

"We see no reason for excepting such cases from the simple general rule which we propose. It will indeed be in general more difficult to prove that death has been caused by a scratch than by a stab which has reached the heart; and it will in a greater degree be more difficult to prove that the scratch was intended to cause death than that a stab was intended to cause death. Yet both these points might be fully established."

As an illustration, a case was supposed of a man inflicting a slight wound on a boy, who stood between him and a large property, contemplating that the ignorant and superstitious servants would apply absurd remedies and so turn the slight incision into a mortal wound; and a letter being produced shewing that this was his expectation.

In the Report of the Indian Law Commissioners, dated 23rd July 1846, in para. 249, it was agreed that "if death is certainly caused by words deliberately used by a person with the intention

of causing that result and with the knowledge that in the condition of the party to whom the words are spoken it is likely that they will make such an impression as to cause death.....there is no sufficient reason why that person should be exempted from the penalty of culpable homicide any more than one who has caused death by the infliction of a bodily injury."

In the original Code it was proposed that if a man intentionally gave false evidence in order to secure the conviction of another for murder and such man is executed in consequence, he should be held guilty of culpable homicide; and an illustration to this effect was included under clause 294. In paragraph 266 of the Report however it was proposed "that, although giving false evidence and thus causing capital sentence to be passed falls naturally within the definition of voluntary culpable homicide, inasmuch as it is desirable to restrict rather than extend capital punishment, illustration (d) should be omitted from clause 294, and that clause 191 be declared applicable to the offence of giving false evidence with the intention of causing a person to be convicted of a capital crime, whether the object intended be effected or not."

Under Explanation I of Section 299 a person who causes bodily injury to another who is labouring under a disorder, disease or infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death.

But although in such a case a person might be held to have caused the death of the other, he cannot be convicted of culpable homicide unless the necessary intention or knowledge is proved; therefore if the offender does not know of the disorder, disease or infirmity, though he may have "caused death," he is not guilty of culpable homicide.

Causing death of person wrongly believed to be dead –

There are some curious cases wherein a person has wrongly believed another whom he has assaulted, to be dead; and has hung up or burnt the body; and has therefore actually caused death by such hanging or burning.

The most recent case is *Palami Gounden v. Emperor* 42 M. 547. In this case and in the case of *Dalu Sardar*, 18 C. W. N. 1279, death was actually caused by the

accused hanging up the body of his wife after he had beaten her, wrongly thinking her to be dead. It was held that the accused could not be convicted of murder or of culpable homicide, but that he could of course be punished both for his wrongful assault on his wife and for his attempt to create false evidence.

A similar case is that of Bishor Dewa, 18 W. R. Cr. 29.

The earlier case of Gour Gobindo Thakoor, 6 W. R. Cr. 55, is discussed in the Madras ruling.

These cases differ from the case of Khandu, 15 B. 194, as therein the accused had struck his father-in-law *with the intention of killing him*; death had actually been caused by the accused setting fire to the hut in which his victim was lying, wrongly believing that he was dead. It was held (one Judge dissenting) that the accused was guilty of an attempt to murder under Section 307. Mr. Mayne in para. 485 doubts the correctness of this ruling (see quotation under the ruling, Bombay (v)).

CLASS II.—CASES WHERE DEATH HAS BEEN CAUSED BY MORE THAN ONE ASSAILANT BY DIRECT VIOLENCE, NOT INCLUDING CASES OF UNLAWFUL ASSEMBLY AND RIOTING.

Sections 34 and 35, 36, 37 and 38, I. P. C., must be referred to in connection with this class of case.

34. When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.

35. Whenever an act, which is criminal only by reason of its being done with a criminal knowledge or intention, is done by several persons, each of such persons who joins in the act with such knowledge or intention, is liable for the act in the same manner as if the act were done by him alone with that knowledge or intention.

36. Whenever the causing of a certain effect or an attempt to cause that effect by an act or by an omission, is an offence, it is to be understood that the causing of that effect partly by an act and partly by an omission is the same offence.

ILLUSTRATION.

A intentionally causes Z's death, partly by illegally omitting to give Z food, and partly by beating Z. A has committed murder.

37. When an offence is committed by means of several acts, whoever intentionally co-operates in the commission of that offence by doing any one of those acts, either singly or jointly with any other person, commits that offence.

ILLUSTRATIONS.

(a) A and B agree to murder Z by severally and at different times giving him small doses of poison. A and B administer the poison according to the agreement with intent to murder Z. Z dies from the effects of the several doses of poison so administered to him. Here A and B intentionally co-operate in the commission of murder, and as each of them does an act by which the death is caused, they are both guilty of the offence, though their acts are separate.

(b) A and B are joint jailors, and, as such, have charge of Z, a prisoner, alternately for six hours at a time. A and B

intending to cause Z's death, knowingly co-operate in causing that act by illegally omitting, each during the time of his attendance, to furnish Z with food supplied to them for that purpose. Z dies of hunger. Both A and B are guilty of the murder of Z.

(c) A, a jailor, has the charge of Z, a prisoner. A intending to cause Z's death illegally omits to supply Z with food, in consequence of which Z is much reduced in strength but the starvation is not sufficient to cause his death. A is dismissed from his office and B succeeds him. B, without collusion or co-operation with A, illegally omits to supply Z with food, knowing that he is likely thereby to cause Z's death. Z dies of hunger. B is guilty of murder, but as A did not co-operate with B, A is guilty only of an attempt to commit murder.

38. When several persons are engaged or concerned in the commission of a criminal act they may be guilty of different offences by means of that act.

ILLUSTRATION.

A attacks Z under such circumstances of grave provocation that his killing of Z would be only culpable homicide not amounting to murder. B, having ill will towards Z, intending to kill him, and not having been subject to the provocation, assists A in killing Z. Here, though A and B are both engaged in causing Z's death, B is guilty of murder and A is guilty only of culpable homicide.

A. Bombay.

(i) Queen-Empress *v.* Magan Lal, 14 B. 115 (1889).

The mere circumstance of a person being present on a lawful occasion does not raise a presumption of that person's complicity in an offence then committed.

(ii) Queen-Empress *v.* Jamal-ud-din, Rat. Un. Cr. C 603 (1892).

Where the accused severely beat a woman under 18 years of age with sticks for exorcising a spirit out of her, with the consent of the woman and her father, it was held that the accused were guilty of culpable homicide under the last clause of Section 304, and not of murder and that they were not entitled to the benefit of Sections 84 and 88.

(See Queen-Empress *v.* Dhondi, Rat. Un. Cr. C. 785 (1895) under Class I, (Bombay), and Nga Po Tha *v.* Emperor, 3 U. B. R. (1917) 54, under Class I, Burma.

(iii) Emperor *v.* Subbappa, 15 Bom. L. R. 303 = 2 Bom. Cr. C. 54 = 19 Ind. Cas. 331 = 14 Cr. L. J. 235 (1913).

When two persons are acting in concert in the sense that their attack on the deceased (with a heavy stick by one and with a heavy stone by the other) was a single indivisible thing, both of them are liable for the resultant murder, under the provisions of Section 37.

(Referred to in 35 A. 506.)

B. Allahabad.

(i) Empress of India v. Chatter Singh, 2 A. 33 (1880).

L, C, K and D conspired to kill S. In pursuance of such conspiracy, L first and then C struck S on the head with a *lathi* and S fell to the ground. When S was lying on the ground, K and D struck him on the head with *lathis*. It was held (Stuart, C. J., dissenting) that in as much as K and D did not commence the attack and it was doubtful whether S was not dead when they struck him, transportation for life was adequate punishment.

(ii) Empress v. Indar, 23 A. W. N. 1882.

When in a quarrel one accused hit the deceased person with a stick and another with an axe and the latter caused death and there was no proof of common intention, it was held that the latter was guilty of culpable homicide and the former was only guilty of grievous hurt (Section 38).

(iii) Empress v. Dharam Rai, 236 A.W. N. 1887.

Unpremeditated acts done by a private individual, which go beyond the object and intention of the original offence, should not implicate persons who take no part in that particular act.

(iv) Queen-Empress v. Bisheshar, 105 A.W. N. 1892.

When the accused beat a person with *lathis* not of a deadly nature and not on any dangerous part of the body, but the person died nine days after, and it was not proved that the accused had any such intention as is described in Section 299 or Section 300, it was held that the conviction must be under Section 325 and not under Section 302 or Section 304.

(v) Queen-Empress v. Munna, 233 A. W. N. 1892.

Two persons were holding the deceased with the intention of beating him when another came and beat him so heavily that he died in consequence. It was not shown that the two persons above referred to intended to cause death or knew that their act was likely to cause death. It was held that they could not be convicted of the abetment of murder.

(vi) Queen-Empress v. Fateh Singh, 149 A. W. N. 1896.

When a fight ensued between one party on their way to a police station to prefer a complaint, and another party who attempted by force to prevent their doing so, it was held that

the former party had a right of private defence, that only those of them who exceeded the limits of such right were liable, and that neither Section 34 nor Section 114 were applicable to the other members of the party.

(vii) *Emperor v. Bhola Singh*, 29 A. 282 (1907).

Three persons attacked a fourth with *lathis* and one of the assailants struck a blow which fractured the skull of the person attacked and caused his death, but the evidence left it in doubt which of the three assailants struck the blow. It was held that the offence for which the three assailants were guilty was grievous hurt rather than culpable homicide not amounting to murder.

"As it has not been proved that the appellants or either of them struck the fatal blow and as there is nothing to show that there was a common intention on the part of all three assailants to inflict such injury as was likely to cause death, we are of opinion that the appellants cannot be convicted of the offence punishable under Section 304. In the absence of evidence to show that there was a common intention to cause death or such injury as was likely to cause death, we think that Section 304 would not apply. Our view is supported by the ruling in *Queen-Empress v. Duma Baidya*, 19 M. 483. In that case three persons assaulted the deceased, and gave him a good beating in the course of which one of the prisoners struck the deceased a blow on the head which resulted in his death. All three were convicted of causing the death of the deceased and were sentenced to transportation for life. In appeal the learned Judges while sustaining the conviction of the accused, who had struck the fatal blow, held that in the absence of proof that all the prisoners had a common intention to inflict injury likely to cause death, the other accused could not be convicted of murder. We have now to consider of what offence the appellants should be convicted. We think that, having regard to the fact that *lathis* were used by all the three assailants, and the probable result of the use of the *lathi* was at least grievous hurt, the common intention of the assailants may be deemed to have been grievous hurt."

The conviction was altered to one under Section 325.

(viii) *Musai v. Emperor*, 13 Cr. L. J. 159 = 13 Ind. Cas 847 (1912).

When four persons attacked one man, who in consequence of the attack died subsequently, it was held that the assailants were guilty under section 302, if the common intention of

he assailants was to cause death or bodily injury likely to cause death or sufficient in the ordinary course of nature to cause death; and under Section 304, if their common intention was to make a violent assault upon the deceased and they knew that they were likely to cause his death. Their intention must be gathered from what they said and what they did at the time of the attack.

(ix) *Emperor v. Kanhai*, 35 A. 329 (1913).

Four persons armed with *lathis* attacked and severely beat a fifth who was unarmed over a dispute about irrigation. The person attacked died in consequence of this beating, and it was found that he had received several severe blows on the head, the result of which was that the bones of the skull were broken to pieces, and there were other injuries about the body, most of the injuries having probably been inflicted whilst the person attacked was on the ground, but the evidence did not disclose which of the assailants caused which of the injuries. It was held that all the four assailants were properly convicted of murder, and that the inference was not justified that the common intention of the assailants was not more than the causing of grievous hurt. (Followed in 3 P. R. 1919.)

(x) *King-Emperor v. Ram Newaz*, 35 A. 506 (1913).

Three brothers, attacked with *lathis* a man against whom they bore a grudge, and beat him with great severity so that he died shortly afterwards. His skull was badly fractured and numerous other injuries were inflicted upon him. It did not appear which injuries were caused by which of the assailants, but the evidence showed that they were acting in concert and intended to cause such bodily injury as was likely to cause death. It was held that all three were guilty of murder.

P. 511. "The deceased was cruelly and mercilessly beaten by three men armed with *lathis* who continued to use their weapons upon him after he had fallen to the ground. The *lathi* is a lethal weapon. The circumstances of the case leave no doubt in our mind that the assailants either intended to cause death or had every reason to believe that the probable result of their joint act would be death. The death was not necessarily the result of any single blow. It was the result of the many blows inflicted on the head. In this respect we would call attention to the decision, *King-Emperor v. Subbappa Channappa*,

15 Bom, L. R. 303 In the present case, as in the reported case, the attack was a single indivisible thing. (Followed in 3 P. R. 1919.)

(xi) Emperor v. Chandan Singh, 40 A. 103 (1918).

Three persons attacked a fourth with *lathis* and death ensued through a fracture of the skull of the person attacked. There was, however, no evidence to show that the common intention of the assailants was to cause death or which of them actually struck the blow which fractured the skull of the deceased. It was held, following 29 A. 282, that the offence of which the assailants were guilty was that of grievous hurt and not that of culpable homicide not amounting to murder, as the common intention was not to cause death or such injury as was likely to cause death but only to cause hurt.

(xii) Emperor v. Gulab, 40 A. 686 (1918).

A dispute having suddenly arisen concerning the cutting of a sugarcane crop, three men armed with *lathis* attacked one of the men who was engaged in cutting the crop and beat him so severely that he died, his skull being broken in three places. A nephew of the man attacked, having his *lathi* with him, attempted to rescue his uncle and also received considerable injuries. It was held that the offence of which the assailants were guilty was not the mere causing of grievous hurt but culpable homicide, which, however, might in the circumstances be considered as not amounting to murder by the application of exception 4 of Section 300.

"It is obviously impossible in cases of this kind to be able to prove that the fracture of the skull which resulted in death was caused by a blow from the *lathi* of any special one of the assailants. In the present instance Hardial had three fractures of the skull and Lal received three *lathi* blows on the head. The three accused were all armed with the same class of weapon. They all attacked Hardial. A *lathi* is a lethal weapon as has been repeatedly held by this court for very many years. The person who uses a *lathi* must know on an occasion like this that he is very likely to cause death. The three accused were moved by a common intention. That intention may not have been to cause death but in carrying out their intention they all used deadly weapons, and they must be deemed to have known that they were likely to cause death. We cannot agree that the accused can only be convicted of voluntarily causing grievous hurt. It is impossible to say whose *lathi* fractured the skull. If five or more persons had

banded together in this matter on behalf of the accused no one would have hesitated to have held all five guilty of the offence of culpable homicide not amounting to murder (Section 149). Why, because the number is reduced these three should not be equally guilty under Section 304, we fail to understand. If one man had committed the offence, he also would have been convicted under Section 304. It is illogical to say that because two others joined with him with similar weapons, that therefore, the offence committed by the three is reduced to the lesser offence of voluntarily causing grievous hurt.

With all due respect to the learned Judge, we find it impossible to agree with the opinion expressed in *Emperor v. Chanda Singh* (40 A. 103). We do not agree with the view of the law taken in that case and in that respect we would point out that it is quite inconsistent with the remarks to be found in *Emperor v. Hanuman*, 35 A. 560. The remarks on P. 563 are worthy of note: "It is impossible to prove by direct evidence the intention of a particular individual. The intention can only be inferred from the result and probable result of his act or conduct. The learned Judge seems to confuse the term 'intention' with 'desire.' It is quite impossible that the three accused had no wish either collectively or individually to kill Sheoratan (as is indicated by the fact that no wound was discovered on his head) but nevertheless if they beat him in the way it is proved they did, they must be taken to have had knowledge that their act must in all probability cause death or such bodily injury as is likely to cause death, and if so, they are guilty of murder. Under circumstances such as these, it is quite immaterial to ascertain whose blow was the immediately fatal one." The learned Judge who decided that case distinctly dissented from the rule of law laid down in *Dhian Singh v. King-Emperor*".

Note.—*Emperor v. Hanuman*, 35 A. 560, has not been entered above as there were five assailants. *Dhian Singh v. Emperor* is published as 9 A. L. J. 180 (1912)=13 Cr. L. J. 265=14 Ind. Cas. 649. Therein it was held that for the application of Section 34 a furtherance of a common design is a condition precedent for convicting each of the persons who take part in the commission of a crime, and the mere fact that several persons took part in a crime, in the absence of a common intention is not sufficient to convict them of that crime. In case, therefore, where several persons joined together in striking another, but there was no evidence to show that the common intention of all was to cause grievous hurt, the conviction of all of them for the same offence would be bad in law. As is pointed out in 40 A. 686, the rule of law laid down in this case was dissented from in 35 A. 560.

(xiii) *Garib v. Emperor*, 17 A. L. J. 985=53 Ind. Cas. 495 (1919).

The accused, two in number, who were incensed against the deceased, committed a brutal assault on the latter, who was defenceless and unarmed, and caused his death. Held that the accused were guilty of murder.

"The person or persons, who committed this act, must have known that it was so imminently dangerous that it must in all probability cause death or such bodily injury as was likely to cause death."

C. Calcutta.

(i) *Gouridas Namasudra v. Emperor*, 36 C. 659 (1909).

Where it was found that two of the accused struck the deceased several blows inflicting severe injuries, one of which was the cause of death, but it was not proved who struck the fatal blow, it was held that, under the circumstances of the case, none of the accused could be convicted of murder by the operation of Section 34 but each of them should be convicted under Section 326.

(ii) *Elem Molla v. Emperor*, 37 C. 315 (1910).

A body of six persons attacked another with cattle goads in a violent and determined manner, inflicting sixteen wounds on his body and causing several ruptures of his spleen and so caused his death. The person attacked was a strongly built man of 35 years of age, and his spleen was in a healthy state. It was held that such acts committed by several persons on one, in such a manner, apparently regardless of the consequences and with such results warranted the inference that the acts were done by those persons with the intention either of causing the death of the person attacked or such injuries as the offenders knew to be likely to cause his death and that the offence amounted to murder. (Followed in 3 P. R. 1919.)

(iii) *Manindra Chandra Ghose v. King-Emperor*, 41 C. 754 (1914).

Section 34 does not involve abetment and therefore does not imply any conspiracy, and does not require proof that any particular accused was responsible for the commission of the actual offence.

(iv) *Emperor v. Nirmal Kanta Roy*, 41 C. 1072 (1914).

Where two persons fire at another and one only actually hits and kills him, the other is not guilty of murder under Section ³⁰²₃₄ but of attempt to murder.

Section 34 applies only where a criminal act is done by several persons of whom the accused charged thereunder is one, and not where the act is done by some person other than the latter. (Followed in 24 P. R. 1919.)

D. Madras.

(i) *In re Golla Sanyasi*, 1 Weir 296 (1881).

The accused, a menial servant, being ordered to attend his masters when they had announced their intention of committing murder accompanied them with the intention of rendering such assistance as might be required of him, and his masters entered the house and killed the deceased, the servant standing at the door. It was held that he was guilty of murder.

(ii) *Queen-Empress v. Duma Baidya*, 19 M. 483 (1896)

Three men assaulted the deceased and gave him a beating, in the course of which one of them struck him a blow on the head which resulted in death. The conviction for murder of the giver of the fatal blow was upheld, but it was held that though the object of all was to give the deceased a beating the other two neither instigated nor participated in the fatal blow, and in the absence of proof that all three had the common intent to inflict injury likely to cause death, these two could not be convicted of murder, but only of grievous hurt.

(iii) *In re Butari Chinnah Vobiah*, 9 M. L. T. 103 = 12 Cr. L. J. 48 = 9 Ind. Cas. 288 (1911).

Where there is nothing in the early stages of the case to indicate who struck the fatal blow, it is not safe to rely on the later differentiation of the parts taken by the various accused and sentence some of them to the extreme penalty of the law.

E. Punjab.

(i) *Crown v. Kunhya*, 10 P. R. 1868.

The mere presence at a murder, without previous concert or approval of the deed, does not constitute the guilt of murder.

(ii) *Faqir Muhammal versus Empress*, 10 P.R. 1890.

The deceased having enticed away a woman who was the wife of one and the daughter of the other accused, the latter armed themselves with sticks with a view to chastise him, and lay in wait for him on the road by which he was expected to pass. When he came up they beat him on the chest and back, but avoided hitting him about the head. The deceased died of the injuries. It was held that the act fell under Clause 2 of Section 304.

(iii) *Gajan v. Queen-Empress*, 18 P.R. 1893.

In the course of a quarrel which arose out of the felling of a tree, one M and the present accused G struck H with *lathis* and thus caused his death. M who was found to have struck the first blow was tried previously, found guilty of culpable homicide not amounting to murder and Section 304.

G was arrested and brought to trial. The Sessions Judge while finding that the accused had no intention of killing H, or of badly injuring him, convicted him nevertheless of murder under the second or third clause of Section 300.

It was held that it did not appear that in attacking H there was present in the mind of the accused anything more than a knowledge that he was likely to cause grievous hurt, and the conviction ought to be under Section 325.

(iv) *Shib Das v. Crown*, 2 P. W. R. 1908—77 P. L. R. 1908—7 Cr. L.J. 321.

S was convicted under Section 304 (2) for stabbing R, and sentenced to 5 years' rigorous imprisonment, but the facts were that S and four others at least struggled with R in a crowd at a dark place, and it was consequently difficult for anyone to see what actually happened and who struck the fatal blow, and the evidence on this point was also conflicting, and great pressure was brought to bear on the witness to make them give evidence as desired. The Chief Court altered the conviction to one under Section 323.

(v) *Langar v. Crown*, 32 P.W.R. 1912 = 16 Ind. Cas.
526 = 13 Cr.L.J. 718.

L and M met and after abuse came to blows and each struck the other down while others had also joined in the fight. M died of the injuries received on that occasion, but there was no reliable evidence that L alone was his assailant. Held that L could not be convicted under Section 304, Part 2, and that any offence beyond an affray under Section 160 had not been committed.

(vi) *Dhani Ram v. Crown*, 1 P. W. R. 1913 = 18 Ind. Cas.
664 = 14 Cr. L.J. 104 = 162 P. L. R. 1913.

In a sudden fight between G, S and M on one side and D R and I on the other for which G on his side and D on the other side were chiefly to blame, blows of ordinary sticks and fists were exchanged and it was alleged that D took up a heavy *sudwai* of an *ekka* close by and gave a severe blow on the head of G, which fractured his skull bone and ultimately resulted in his death; but it was neither proved conclusively that D did so, nor was there any indication that originally D or any member of his party intended or knew it to be likely that any such serious injury would be caused. It was held that D could not be convicted of an offence either under Section 304 or 325, I.P.C., and D and his party were only responsible for simple hurt under Section 323.

(vii) *Gul Shah v. The Crown*, 41 P.W.R. 1914 = 16 Cr. L.J. 93 = 26 Ind. Cr. 1005:—

When four persons joined in beating a fifth, out of which two gave him fatal blows on the head which resulted in his death, while the remaining two struck him on the body not with exceptional violence and were not shown to have realized that they were taking part in a murder or how grave the injuries inflicted by their comrades were; it was held that they were guilty of causing simple hurt under Section 323.

(viii) *Nawab and Dallal v. Crown* 31 P. R. 1914:

See ruling No. VII and also see this case cited in the discussion on the fourth clause of Section 300 under Class I.

(ix) *Agra versus The Crown*, 37 P.R. 1914.

"As regards A and B it is proved that they attacked the deceased, but he only received one blow on the head and

there is no evidence to show which of the two gave him that blow—Under the circumstances, following Emperor v. Bhola Singh 29 A. 282 we are of opinion that neither of these two persons can be convicted under Section 304. It can, however, be safely held that when they attacked A they intended or knew it to be likely that they would cause grievous hurt, and therefore they are guilty under Section 325."

(x) *Sed Rasul v. Crown*, 27 P. R. 1916.

The two accused broke into a house at night with intent to commit theft armed with deadly weapons, they left the house on the alarm being raised, and in the courtyard stabbed a man who tried to seize them injuring him so that he died.

It was held that as the stabbing was done after the house-breaking was completed Section 460 did not apply, but accused were guilty of offences under Sections 457, 458 and 326.

(xi) *Harbans v. Crown*, 33 P.R. 1916.

Accused was one of a party of burglars. The owner of the house seized the accused as he was trying to escape and in the scuffle was mortally wounded by him.

The accused was committed under Section 460 but the Sessions Judge altered the charge to one under Section 302. The Chief Court held that the conviction under Section 302 could not be upheld. In view of the fact that the fatal blow was given in the dark in the course of a scuffle in the earlier part of which some minor blows were inflicted, it is open to argument whether the accused intended to cause death or even to cause such bodily injury as was likely to cause death, the weapon was dangerous but the struggle took place in the dark. It was held that justice would be satisfied by a conviction under Section 460.

(xii) *Jahana v. Crown*, 109 P. L. R. 1906 = 45 P. W. R. 1916 = 17 Cr. L. J. 451 = 36 Ind. Cas. 131.

Where death was caused in an attack on the deceased by several accused persons the conviction under Section 304 (2) of the accused who was proved to have struck the first blow on the head with *pahaura* was upheld, but it was held that the convictions of the other accused must be under section 325, only.

(xiii) Pal Singh and Surain Singh v. Crown, 28 P. R. 1917.

The two accused assaulted the deceased without any direct motive but apparently merely because they had been drinking and literally beat him to death with *lathis*.

It was held that the accused were guilty under Section 300 (4).

P. 109. We have no hesitation in saying that Section 325 does not apply, nor, having regard to the merciless nature of the beating inflicted on the deceased, can we allow that the act of the appellants can be brought under the scope of part 2 of Section 304. When two men set on a third and beat him with *lathis* with the violence and brutality evidenced by the result of the post-mortem in this case, there can be no doubt that they must be held to have known that the act was so imminently dangerous as was likely to cause death" (see page 54).

(xiv) Samand Singh v. Crown, 3 P. R. 1919.

The four accused had caused the death of the deceased by giving him an unmerciful thrashing with sticks, smashing both bones of each forearm, the right elbow, and right knee cap and the occipital bone over the right temporal area of the skull.

It was held that all the accused were guilty of murder. "Our attention was drawn to 18 P.R. 1893, 2 P.W.R. 1908 (Shib Das versus Crown, 1 P.W.R. 1913 Dhani Ram versus Emperor), 7 P.L.R. 1911 (Lachman Singh versus King-Emperor), 40 A. 103, and 32 Ind. Case 833 (Bachinta v. Emperor).

Previous decisions in criminal cases, proceeding as they do on their own set of facts, seldom afford any very great assistance in deciding the nature of an offence. The facts of 18 P. R. 1893 were quite different and the finding there was that the accused had no intention of killing or badly injuring the deceased. The same applies to 2 P. W. R. 1908. The facts of 1 P.W.R. 1913 have no similarity, and 7 P. L. R. 1911 has no bearing on the case. In 40 A. 103 three persons attacked a fourth with *lathis* and death resulted through fracture of the skull of the person so attacked. In the present case death was due to a merciless thrashing. In 32 I.C. 833 death was caused by arsenic. The Government Advocate who supported the application for enhancement, drew our attention to 31 P.R. 1914, 35 A. 329 and 506 and 37 C. 315.

In the ruling of this court it was held that when two persons beat an unarmed man to a jelly and fractured 14 ribs, it is difficult to see how the assailants could have had any intention short of causing death or causing such bodily injury as was likely to cause death. In 35 A. 329 the facts were very similar to those of the present case, four men attacking a fifth with *lathis*, and it was held that Section 302 was applicable. The same was the case in 35 A. 506. In 37 C. 315, six persons attacked a man in a determined manner inflicting 16 wounds on his body and caused his death. It was held that such acts committed by several persons on one, in such a manner apparently regardless of the consequences and with such results, warranted the inference that the acts were done by those persons with the intention either of causing the death of the person attacked or such injuries as the offenders knew to be likely to cause death, and that the offence, therefore, amounted to murder. With the principles enunciated in these rulings we are in complete accord and we consider that the facts in this case clearly bring the appellants within the purview of Sections 302."

(xv) *Raja v. Emperor*, 18 P. L. R. 1919=50 Ind. Cas. 977.

The accused, three in number, came up where the deceased was ploughing a plot of land to prevent him from doing so. The deceased resisted and thereupon the accused attacked him with sticks and *phaura*, and caused his death by a blow on the head. It was not clear which of the accused had struck the fatal blow.

"One or other of the appellants was guilty of striking the deceased on the head, and in doing so he was but carrying on the common intention of the three appellants. A *phaura* is not such a weapon as would inevitably cause death, and the fact that one of the appellants was also hit on the head with the same *phaura*, and yet suffered no great injury, is sufficient proof that a blow from it even on the head would not necessarily cause death. In our opinion the offence of which the offenders were guilty was that punishable under Section 325 read with Section 34.

(xvi) *Bahal Singh and Mula Singh v. Crown*, 24 P. R. 1919.

As regards B S it was held that though he was present, he not having struck the deceased, it could not be said that the criminal act was done by both the accused *jointly in furtherance*

of the common intention, and Section 34 was consequently inapplicable and B S could not be convicted under Section 302 read with Section 34.

Emperor v. Nirmal Kanta Roy, 41 C. 1072 (1088) was followed, and 21 A. 263 and 40 A. 686 were distinguished, because all the accused in those cases joined in the attack.

But it was held further that as both accused had armed themselves with deadly weapons, B S must have known that, in case of opposition, the weapons would be used and in all probability grievous hurt would be caused; and he was, therefore, guilty under Section 325 read with Section 109.

(xvii) *Ramzan v. Emperor*, 54 Ind. Cas. 51 (1920 Punjab).

Two persons, unreceiving provocation, delivered an unpremeditated attack on the deceased, but it was not known who struck the fatal blow. Held that both were guilty on an offence under Section 325.

F. Burma.

(i) *Hakim Ali v. Queen-Empress, L. B. R. 1893-1900 150.*

Where several persons are charged with murder on the ground that the murder was a probable consequence of an act abetted by them, or because the murder was committed by means of several acts, and the accused intentionally co-operated in the murder by doing any one of those acts, or because the murder was committed in furtherance or prosecution of the common object or intention of all the accused, the law applicable is to be found, not in Section 34 which covers the case of a single act done by several persons but in Sections 34, 111, 149. If criminal liability for the offence of murder does not attach to the companions of the actual murderers or to those who are alleged to have abetted the murder or to have intentionally co-operated in committing it, then the murder becomes an independent offence for which the actual murderer's companions are not liable, unless they are made liable by some special provision such as that enunciated in Section 396.

(ii) *Po Sein v. King-Emperor, I L. B. R. 233 (1902).*

Section 34 renders punishable all persons engaged in a common criminal intent for any act done in the furtherance of the common intention. It seems framed to meet a case in which it may be difficult to distinguish between the acts of the individual members of a party or to prove exactly what part was taken by each of them. When three men assault and beat another man with such violence that one blow causes extravasation of the blood and fells him to the ground, while another blow fractures two of his ribs, the assailants must be presumed to have intended to cause such bodily injury as they knew to be likely to cause the death of the person assaulted. It being a matter of common knowledge that such assaults frequently cause death they must be held to know that they are likely by those acts to cause death.

Per Fox, J.:—If two or more persons combine in injuring another in such a manner that each person, engaged in causing the injury, must have known that the result of such injury may be the death of the injured person, it is no answer on the part of any one of them to liability for the consequences of causing death to allege and perhaps prove that his individual act did not cause the death and that, by his individual act, he cannot be held to have intended death. Everyone of them must

be taken to have intended the probable and natural results of the combination of acts in which he joined. When the acts of the combination proved are blows causing severe bodily injury sufficient in the ordinary course of nature to cause death, each of the accused taking part in the combination is guilty of murder.

(iii) King-Emperor v. Pha Laung, 3 L. B. R. 264=5 Cr. L. J. 414 (1906).

Where the fourth and sixth accused held the complainant while the first and second speared him the spearing must be held to have been done in pursuance of the common intention of those four persons, and the third and fourth are guilty of voluntarily causing hurt with a spear, not under Section 114, but under Section 34.

But that as there was nothing to show that the third and fifth accused assisted in the spearing or that their common intention went beyond beating the complainant with their hands they were guilty under Section 323 only.

(iv) Nga Tun Baw v. King-Emperor, U. B. R. 1907, 3rd Qr. 5=7 Cr. L. J. 205=14 Bur. L. R. 264.

It is a necessary condition to make a person liable under Section 34 that the "common intention" must cover the act done by all the several persons.

(v) Nga Ba E v. King-Emperor, 7 Bur. L. T. 71=15 Cr. L. J. 484=24 Ind. Cas. 572 (1914).

The appellant and his companions went together to strike the deceased. The appellant was found to have inflicted only one injury out of three all of which were contused wounds caused by blunt weapons. One was on the left eye and was slight, the second on the nose was dangerous to life but could be cured; the third on the parietal bone which fractured the skull was necessarily fatal. The appellant stated that he inflicted one blow with a light cane. It was held that it would not be safe to assume that the common act intended by all the assailants was more than to cause grievous hurt.

(vi) Nga Shwe On v. Emperor, 10 L. B. R. 117=13 Bur. L. T. 47=57 Ind. Cas. 918 (1920).

Where several persons armed with *das* attack another and cause his death, but it is found that their common intention was not to cause death or such bodily injury as would be sufficient in the ordinary course of nature to cause death, it may rightly be inferred that their intention was to cause grievous hurt. In the absence of any satisfactory evidence showing which of them caused the fatal wound, it is not permissible to hold that any of them is guilty of murder.

G. Patna.

(i) *Satrughan Patar v. Emperor*, 50 Ind. Cas. 337 (1919).

Per Manuk, J. :—There must be evidence from which one might reasonably infer a common intention infecting each of the accused, in order to apply Section 34 and hold each of the accused responsible for the act done by several persons in furtherance of the common intention of all.

The presumption of constructive intention must not be too readily implied or pushed too far. It is obvious that the mere fact that a man may think a thing likely to happen is vastly different from his intending that that thing should happen. The latter ingredient is necessary under Section 34, the former by itself is irrelevant to the section. It is only when a Court can with some judicial certitude hold that a particular accused must have preconceived or premeditated the result which ensued and acted in concert with the others in order to bring about that result that Section 34 may be applied.

(19 M. 483, 29 A. 282, 36 C. 659, were cited). In 35 A 506 all these cases were distinguished. It was observed that the facts and circumstances of each case vary and each case has to be decided in view of its actual facts. The learned Judges also held that whether there was or was not premeditation in the case before them was not clear, but there was concerted action; and the attack was so ferocious as to lead almost to the inference that it had been premeditated, and that death was the result of the many blows inflicted on the head by all the appellants.

H. Other Rulings.

(i) *Imperator v. Vahal*, 5 S. L. R. 247 = 15 Ind. Cas. 810 = 13 Cr. L. J. 538 (1912).

Where one accused struck the deceased with a stick after he had fallen from the blows with a hatchet inflicted by another accused, it was held that it did not necessarily follow that the former had a common intention with the latter to commit murder.

(ii) *King-Emperor v. Mahabirt*, 16 O. C. 19 = 19 Ind. Cas. 497 = 14 Cr. L. J. 241 (1913).

There are usually three classes of cases of fatal assault where the question of the joint responsibility of the several assailants arises, viz.

(1) Where several persons join in the assault, and inflict numerous injuries, and the cumulative effect of all or some of the injuries is to cause death ; (2) where several persons commit the assault and inflict minor injuries but one of them deals a fatal blow and there is evidence of the latter's guilt; (3) when several persons beat a man and inflict minor injuries on him but one of the assailants deals a fatal blow and the evidence leaves it in doubt as to who struck the fatal blow. In the first case all the assailants are responsible for the fatal assault; in the second case the person who is shown by the evidence to have dealt the fatal blow is alone responsible, and in the third case none is responsible for the fatal blow.

The dealing of one fatal stroke by one of the several assailants cannot form the basis of a valid inference that the common intention of all the assailants was to murder the person attacked.

When persons go with the intention to prosecute a common object, each and everyone becomes responsible for the acts of each and every other in execution and furtherance of the common purpose. But a distinction has to be drawn between unpremeditated acts done by a particular individual which go beyond the object and intention of the original offence and premeditated acts of the parties as shown by their conduct in the affair.

When the acts of a combination of persons proved are blows causing severe bodily injury sufficient in the ordinary course of nature to cause death, each of the accused persons taking part in such combination is guilty of murder.

(iii) Queen v. Pooshoo, 4 W. R. Cr. 33.

When four men beat another to death at intervals, and so severely that death ensues from the injuries received, they must be presumed to have known that by such acts they were likely to cause death, and when these acts were done when there was no grave or sudden provocation or no sudden fight and quarrel, the offence which they have committed is murder; and it is not reduced to culpable homicide not amounting to murder by the absence of intention to cause death.

(iv) Saidino v. Emperor, 9 S. L. R. 99=30 Ind. Cas. 998 =16 C. L. J. 710 (1915).

Four men attacked the diseased with *lathis* and beat him with such severity that he died.

"We do not think that Section 300 (4) applies to cases where there is an intention to cause bodily injury to any particular person...we differ from the case of Hanuman v. Emperor, 35 A. 360, where Section 300 (4) was applied to a case similar to the present.

The Sessions Judge also refers to the case Elem Molla v. Emperor, 37 C. 315, which was also a case of brutal assault with *lathis*. The Judge there held that the accused either intended to cause death or that they attacked the deceased in such a brutal manner regardless of consequences, well-knowing that they would be likely to cause his death.

On the first hypothesis, the offence was of course murder under Section 300 (1). If the second hypothesis is intended to apply to Section 300 (4), then the same criticism applies to this case as to Hanuman v. Emperor. And if it is intended to apply Section 300 (2) then we differ also, for the material words in the part are 'the person to whom the harm is caused.' The essence of Section 300 (2) is that the particular person injured is suffering from some infirmity known to the accused, which would make his death a probable result of the harm caused. Apart from these special cases, brutal assaults such as the present do not ordinarily amount to murder unless the accused intends to cause death or to cause such bodily injury as is sufficient in the ordinary course of nature to cause death."

GENERAL REMARKS.

In cases of death being caused by an attack by more persons than one, the main question to be considered is whether there was a common intention of all the assailants. It is now a generally accepted principle of law that, when a large number of serious injuries are caused, a common intention may be presumed, and it is not necessary to ascertain which particular blow or blows were actually fatal or which of the assailants delivered those blows. It may either be the case that death was the cumulative result of all the blows and that it could not be said that one blow was necessarily fatal and that another blow was not fatal, or it may be argued that, merely because one of the assailants did not have an opportunity to deliver a fatal blow, he cannot for that reason be acquitted of the offence of culpable homicide, if he also had the intention in common with the others to cause death or such injury as was likely to cause death. As is pointed out by Fox, J. in *Po Sein v. King-Emperor*, 1 L. B. R. 233, in such a case it is no answer on the part of any one of the assailants to liability for the consequences of causing death to allege and perhaps prove that his individual act did not cause death, and that by his individual act he cannot be held to have intended death.

In such cases, even if it be shown that there was only one blow on the head which fractured the skull and it be proved which of the assailants delivered that blow, the other assailants, who have also violently and mercilessly beaten the deceased on other parts of the body, would be equally liable for the offence of killing.

(*Vide Emperor v. Subbappa*, 15 Bom. L. R. 303.

Emperor v. Kanhai, 35 A. 329.

Emperor v. Ram Newaz, 35 A. 506.

Emperor v. Gulab, 40 A. 686.

Ele Molla v. Emperor, 37 C. 315.

Nawab and Dullah v. Crown, 31 P. R. 1914.

Samand Singh v. Crown, 3 P. R. 1919.

King-Emperor v. Mahabirt, 16 O. C. 19.

Queen v. Pooshoo, 4. W. R. Cr. 33).

There is however another class of case in which there can be no inference that it was the common intention of all the assailants to cause death or to cause such injuries as are likely

o cause death, but one of the assailants, in excess of the common intention, delivers a fatal blow which causes death; for instance, when all the blows except the fatal one are minor injuries, such as, in the absence of the fatal blow, could not by themselves have caused death and could not give rise to any inference that the assailants had any common intention to cause such injuries as were likely to cause death. In such cases, if it can be proved who struck the fatal blow, he can be convicted of the more serious offence, but the others can only be convicted of the offence which they intended to cause, namely simple or grievous hurt.

(*Vide Queen-Empress v. Duma Baidya*, 19 M. 483.

Empress v. Indar, 23 A. W. N. 1882.

King-Emperor v. Mahabirt, 16 O. C. 19.

Gul Shah v. Crown, 41 P. W. R. 1914.)

If, in such a case, it cannot be ascertained who gave the fatal blow, none of the assailants can be convicted for the killing, and all must be convicted only of the offence which it was their common intention to commit.

(*Vide Emperor v. Bhola Singh*, 29 A. 282.

Emperor v. Chandan Singh, 40 A. 103.

Empress v. Dharam Rai, 236 A. W. N. 1887.

Agra v. The Crown, 37 P. R. 1914.

Jahana v. Crown, 109 P. L. R. 1916.

Dhian Singh v. Emperor, 9 A. L. J. 180.

Ramzan v. Emperor, 54 Ind. Cas. 51, Punjab.

Nga Shwe On v. Emp., 10 L. B. R. 117.

In 40 A. 686 the Judges dissented from the view of the law as laid down in 40 A. 103, and 35 A. 560 dissented from 9 A. L. J. 180.

The dissent however can only have been as to the inference of intention that may be drawn. The Judge (Karamat Hussain, J.) who decided *Dhian Singh v. Emperor*, was one of the two Judges who in the same year held in *Musai v. Emperor* (13 Cr. L. J. 159) that if the common intention of all the assailants was to cause death or such injury as was likely in the ordinary course of nature to cause death, all the assailants would be guilty of murder.

It is all a question of intention ; and intention cannot only be proved by direct evidence, such as words used by the assailants at the time of the attack, but can also be inferred from the nature of the weapons used, the seriousness and number of the injuries inflicted and the violence of the attack. If the nature of the attack and the injuries are not sufficient for any inference of a common intention to kill or cause bodily injury likely to cause death, then, if it is not ascertained who inflicted the fatal blow, none of the assailants can be convicted of murder.

In such cases it has been generally held that the conviction should be for grievous hurt or hurt (29 A. 282 ; 40 A. 103 ; 105 A. W. N. 1892 ; 36 C. 659 ; 19 M. 483 ; 18 P. R. 1893 ; 37 P. R. 1914 ; 2 P. W. R. 1908 ; 1 P. W. R. 1913 ; 18 P. L. R. 1919 ; 7 Bur. L. T. 71).

The question of the applicability of the 4th clause of Section 300 to such cases of assault has been discussed under the first class.

It would appear from the rulings cited above that it is the general opinion that the second part of Section 304 is not applicable to cases where death is caused by an attack by more than one assailant especially if it cannot be certain which blow was struck by any individual accused (*vide inter alia*, 29 A. 282 and 109 P. L. R. 1916).

The offence is either culpable homicide amounting to murder (if none of the exceptions apply) or simple or grievous hurt, or the conviction may be under a special section, such as 460 (*vide* Harbans *v.* Crown, 33 P. R. 1916).

In Musai *v.* Emperor, 13 Cr. L. J. 159, it is suggested that if the common intention was to make an attack and the accused knew that thereby they were likely to cause death, they could be convicted under Section 304 ; but in such a case it could surely be held that they intended to cause injuries likely to cause death. If not, they can only have intended to cause hurt or grievous hurt.

The second part of Section 304 was applied in Queen-Empress *v.* Jamal-ud-Din, Rat. Un. Cr. C. 603, wherein the beating was done for the purpose of exorcising an evil spirit. But in a similar case (Queen-Empress *v.* Dhondi, Rat. Un. Cr. C. 785), where the offender was the husband, it was held that he was not guilty of any offence, as what he did was done in ignorance and in good faith. In Nga Po Tha *v.* Emperor, 3

U. B. R. (1917) 54, the conviction in such a case was under the second part of Section 304. I have discussed this case under Class I.

In Nga Po Kyaw v. King-Emperor, I. U. B. R. 1902=1903 in a similar case, the offence was held to be one under Section 304-A.

Section 304, Part 2, was also applied in Faqir Mohammad v. Emperor, 10 P. R. 1890, but it seems difficult to reconcile this ruling with other rulings. The intention of the accused was only to chastise the deceased and they beat him only on the chest and back. If there was not present in the mind of the accused anything more than a knowledge that they were likely to cause grievous hurt, then the conviction should be under Section 325, as was held in Gajan v. Queen-Empress, 18 P. R. 1893.

If there was any knowledge that the injuries which they intentionally inflicted were likely to cause death, then the conviction would be for murder. The same arguments apply to such cases as have been advanced under Class I.

Section 304 was applied also in Emperor v. Jhamman (58 Ind. Cas 942, Allahabad) where there was a fight between two parties armed with *lathis*, but the question was not discussed in detail.

NOTE.—This ruling is not included among the Allahabad rulings as it was published subsequently to the printing of those pages).

The conviction of one of the assailants under Section 304 (2) in Jahana v. Emperor (109 P. L. R. 1916) has been discussed under Class I.

Section 34.

Section 34 can only be applied to those persons who actually take part in the assault, as it is essential that the criminal act should be done by all the persons jointly (24 P. R. 1919; 41 C. 1027). The act must also be done in furtherance of the common intention of all ; the fact that one of the party thought the act likely to happen is by itself irrelevant to the section. Here lies an important difference between Section 34 and Section 149 (50 Ind. Cas. 337, Patna).

CLASS III.—DEATH CAUSED BY POISONING.

A. Bombay.

(i) *Emperor v. Nagawa.*

4 Bom. L. R. 425 (1902):

The accused administered arsenic to the deceased, her lover, in sweetmeat balls given to him to eat, in the belief that it was a charm which would revive his love for her, but she did not know that this substance was a deadly poison. It was held that to support a conviction against her under Section 328 it must be shown that the poison was administered with intent to cause hurt or to commit or facilitate the commission of an offence or knowing it to be likely that she would thereby cause hurt.

(See reference in 31 A. 290).

(ii) *Emperor v. Ramava Channappa;* 17 Bom. L. R. 217 = 3 Bom. Cr. C. 38 = 16 Cr. L. J. 305 = 28 Ind. Cas. 641 (1915).

The accused administered to her husband a deadly poison (arsenious oxide) believing it to be a love potion, in order to stimulate his affection for her. The husband died from the effects of the poison. It was held that the accused was guilty of an offence under Section 304 A, inasmuch as she acted both negligently and rashly in dealing, as a love potion, with a deadly form of poison.

(iii) *Bhagava Giriappa v. Emperor,* 19 Bom. L. R. 54 = 38 Ind. Cas. 1003 (1917):

The administering of an injurious drug or potion to a person to induce love in ignorance of its nature or effect and without care and cautious enquiry as to its properties, which causes serious illness to such person, amounts to an offence under Section 337, and not Section 307.

But the person from whom the drug is procured, e.g. the woman's lover, may be guilty under Section 307, and a person who helps him to prepare the drug, may be guilty under Section 328/109.

B. Allahabad—

(i) Queen-Empress *v.* Tulsha, 20 A. 143 (1897)

Where a woman of 23 was found to have administered *dhatura* to three members of her family, it was held that she must be presumed to have known that the administration of *dhatura* was likely to cause death although she might not have administered it with that intention. Death, as a matter of fact, did not result and the conviction was under Section 307, but it was held that it must be presumed that people of the age of the accused have the ordinary knowledge of what the results may be of administering *dhatura*.

(The correctness of this decision was doubted in 19 P. R. 1919).

(ii) Emperor *v.* Bhagwan Din, 30 A. 568 (1908) :

For the purpose of facilitating robbery, *dhatura* was administered to two travellers in consequence of which one of the travellers died, and the other was made seriously ill. It was held that in respect of the traveller who died, the offence committed was that punishable under Section 325, and in respect of the traveller who did not die, the offence committed was that defined by Section 328.

"We do not feel absolutely convinced that the accused or either of them had any intention to cause bodily injury likely to cause death or knowledge that the act was likely to cause death. *Dhatura* is not exactly a deadly poison, and may often be given for the purpose of merely stupefying a victim.

We agree that the case does not fall under Section 304. If the accused administered *dhatura* with the intention of causing death or with the intention of causing such bodily injury as was likely to cause death or with the knowledge that they were likely by administering the poison to cause death, they would be guilty of culpable homicide, and the act would not come within any of the exceptions mentioned in Section 302."

(Referred to in 19 P. R. 1919).

(iii) Emperor *v.* Gutali, 31 A. 148 (1909) :

Dhatura was administered with the usual object of facilitating robbery, but in such quantity that the person to whom it was given died in the course of a few hours. It was held that the accused was rightly convicted under Section 302.

"We consider that, although he may not have intended to kill R. N. he must be held to have known that his act in giving a dangerous substance in such quantity, was at least likely to cause death."

(*Note.*—Earlier rulings were not referred to but here is a note by the Editor, "But see 30 A. 568").

(Referred to in 19 P. R. 1919).

(iv) *Emperor v. Jamna*, 31 A. 290 (1909) :

The accused received a powder from the enemy of her relation, took no precaution to ascertain whether it was noxious and mixed it with his food, believing that by doing so she would become rich. It was held that her conduct was wanting in that prudence and circumspection which every human being is supposed to exercise, and as by her rash and thoughtless act she caused death, she was guilty of an offence under Section 304 A.

(*Note.*—Referring to *Emperor v. Nagawa*. 4 Bom. L. R 425, it was noted that it was held therein that as the evidence did not establish the necessary guilty mind, the accused must be acquitted, but the question whether the act of the accused in that case did not come under Section 304 A was not considered. *Queen-Empress v. Bhakhan*, 60 P. R. 1887, was referred to and it was held that the law was correctly stated therein).

(v) *Emperor v. Jeoli*, 39 A. 161 (1917) :

The accused had an intrigue and obtained poison and mixed it with *halwa*, and gave it to her husband. Other people including the deceased, partook of it: the others recovered.

It was held that when a person intending to kill one person kills another by mistake he is as much guilty of murder as if had killed the person whom he intended to kill.

Reference was made to *Public Prosecutor v. Mushunooru Suryanarayana Moorty* (13 Ind. Cas. 833, 1912), and the view taken by the majority of Judges in that case was accepted.

Agnes Gore's case was also referred to (77 English Rep, 853). In that case the accused, intending to murder her husband mixed poison with his medicine. Her husband, not liking the taste, would not take the medicine. The apothecary, in order to vindicate his reputation and insisting that the medicine had

been properly prepared, drank it himself and died. The Judges were unanimously of opinion that the accused was guilty of murder.

The death sentence was confirmed and it was held that it was not an extenuating circumstance that the deceased was the victim instead of the husband.

(vi) *Emperor v. Gauri Shankar*, 40 A. 360 (1918) :

A person who administers a well-known poison like arsenic to another must be taken to know that his act is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death ; and, if death ensues, he is guilty of murder, notwithstanding that his intention may not have been to cause death.

"The question requires to be considered carefully with reference to the provisions of Sections 299 and 300. With regard to the former of these sections, we think that there can be no doubt that G. S. intended to cause bodily injury to the two boys, and that the bodily injury which he intended to cause by the administration of the arsenic was of a kind likely to cause death. Further we are quite prepared to hold that in administering arsenic to the boys he knew that he was likely thereby to cause death. When we come to consider the provisions of Section 300 (2) it becomes evident that the present case is one very much on the border line. Somewhat similar questions have had to be considered by this Court in cases of *dhatura* poisoning, and there has been some conflict of authority, as may be seen from the following cases 20 A. 143, 30 A. 568, 31 A. 148. Each case must of course be decided on its own facts, but it seems a grave matter to hold that a man of the accused's age administering a substance like arsenic, with the effects of which the agricultural population of Northern India are well acquainted, to a boy of Parmanand's age, and actually causing his death thereby, is to be found guilty of any offence short of murder, even though his intention at the time may not have been (and probably was not) to cause the death of the child."

It was held therefore that the case fell within the definition of murder, but regarding it as a case standing very much on the border line, and accepting the conclusion that his intention was not to cause the death of either of the boys, the Judges did not think it necessary to pass the severer sentence, and the sentence given was transportation for life.

(vii) P. N. de Souza v. Emperor, 42 A. 272 (1920) :

Accused was in charge of a carelessly and badly managed dispensary. He had to use some quinine hydrochloride, and took a bottle from the non-poisonous medicines cupboard ; without looking at the wrapper on the outside of which was printed the word "poison" and without reading the label on the bottle on which was printed "strychnine hydrochloride," he mixed the contents of the bottle into a mixture, and administered the mixture to several persons all but one of whom died.

Held that the act of the accused amounted to gross and criminal negligence, and that he had been rightly convicted under Section 304 A.

C. Calcutta.

(i) Emperor v. Jasha Bewa, 11 C. W. N. 904 = 6 Cr. L. J. 154 (1907) :

Where the accused, a girl of 16, was held guilty of deliberately killing her husband by means of arsenic poisoning, it was held that in consideration of her age she should be transported for life instead of suffering the extreme penalty.

(ii) Pika Bewa v. Emperor, 39 C. 855 (1912) :

The mere administering of a love potion or a drug, which a person thinks might be beneficial is not in itself an offence, but when it is supposed to have effect upon persons with whom the paramour of the accused had enmity, and when she administers it without due care and caution or any enquiry as to what it really is, her act falls under Section 304 A.

D. Madras.

(i) Public Prosecutor *v.* Suryanarayana Moorthy, 136 M. W. N. 1912 = 11 M. L. T. 127 = 13 Cr. L. J. 145 = 13 Ind. Cas. 833 :

S with the intention of killing N, gave him poisoned sweetmeat. N, after eating a little, threw the rest away and this was picked up by R who ate it and died. It was held that S was guilty of murder.

(Referred to in 39 A. 161).

E. Punjab.

(i) *Crown v. Khema*, 8 P. R. 1869 :

Accused caused to be given to the deceased some substance which he alleged to have been given with intent to bring on madness. It was held that the act of the prisoner was known to be likely to cause death, and therefore he was properly convicted of murder, but as death was not the immediate object of his intention, the sentence of death was commuted.

(ii) *Mt. Sultan v. Empress*, 35 P. R. 1884 :

Plowden, J. discussed cases where death has been caused by some poisonous substance supplied by a third person, and administered by the accused to the deceased person, who upon some ground or other was obnoxious to the accused, and in which the defence is that the substance was sought and received as a charm, and was administered upon an express assurance or belief that it was a charm and without knowledge that it would cause fatal results :—

"It does not necessarily follow that because the substance administered was in fact a deadly poison the nature and properties of the substance were known to the person who administered it. In deciding this question the ordinary rules of evidence and reasoning apply, and the decision must be formed upon all the legal material available. The circumstances that there may be a difficulty in establishing the requisite knowledge or intention by no means discharges the prosecution from the burden of so doing. No Court is at liberty to infer merely from the fact that the substance administered with fatal results was, for example, arsenic, that therefore the act was murder on the simple ground that to admit the plea of ignorance that the substance employed was arsenic or that it had deadly properties would be dangerous to society. The guilty knowledge or intent must be established whether ignorance of the nature and properties of the substance administered is pleaded or not ; and, when it is pleaded, the plea cannot be ignored. The ignorance pleaded must be negatived, and the guilty knowledge or intent established, not necessarily by direct evidence, which is often impossible, but by inference from all the circumstances, the probable motive, the object, the general knowledge of the class to which the accused belongs and his conduct in relation to the particular transaction."

(iii) Mt. Bakhan v. Empress, 60 P. R. 1887 :

Accused having intrigue with her paramour received poison from him to administer to her husband as a charm, and administered it with the result that death ensued; the death was caused by the substance which was arsenic but the accused did not know the substance to be noxious till she had seen its effects.

It was held that the offence committed was under Section 304 A, her act not amounting to culpable homicide, but being a rash act.

The giving of the suspicious substance to the husband without taking any steps to ascertain that it was harmless fell within the definition of a rash act, and it was an act which caused her husband's death notwithstanding that she neither knew nor intended it to be likely that the act would cause his death. Knowing that the substance came from her paramour and was to act on her husband as a charm, it became her duty to ascertain that it was innocuous before she administered it to her husband, and culpability was imputable from the absence of that caution and circumspection which ought to have been exercised in ordinary prudence (referred to in 31 A. 290).

(iv) Lala v. Crown, 32 P. L. R. 1911 = 12 Cr. L. J. 125 = 9 Ind. Cas. 731 :

The accused administered *dhatura* poison to A and B both of whom died from the effects thereof, and on the following date he administered the same poison to C and D, the former got ill and recovered, but the latter died. It was held that the accused was guilty of the offence of murder, for, when he administered *dhatura* poison, he committed an act which even if not committed with the intention of causing bodily injury likely to the knowledge of the offender or in the ordinary course of nature to cause death, was so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death (31 A. 148 followed; 30 A. 568 dissented from). Held further that the accused was guilty of an offence under Section 307 as regards the poison administered to C (referred to in 19 P.R. 1919).

(v) Sadhu v. Crown, 19 P. R. 1919 :

Two persons were convicted of administering *dhatura* for the purpose of facilitating robbery, resulting in the death of two persons.

"In 20 A. 143 a woman who had administered *dhatura* to three members of her family, who all recovered, was found guilty of an attempt to murder, but it is not clear how the Court came to that finding, as it was held that, although the accused knew that she might cause death, she had no intention to do so but intended only to incapacitate temporarily the person to whom she administered the *dhatura* in order that she might fly with her lover. In 31 A. 148 the offence committed was held to be murder, because the *dhatura* had been given in such quantity that the person to whom it was given died in 3 or 4 hours. In the present case the deaths occurred after a much longer interval, and there is nothing to show how much *dhatura* was given.

The learned Government Advocate has also cited 32 P. L. R. 1911, but that case is distinguished as the learned Judge found that the appellant was an expert in *dhatura* poisoning, and knew well that the poison worked in a most effective and dangerous manner upon his victims.

On the other hand, in 30 A. 568, where *dhatura* had been administered to travellers, one of whom died, and the first Court had convicted under Section 304, the High Court on appeal altered the conviction to one under Section 325 though the learned Judges remarked that the case might possibly have come under Section 326.

We are of opinion that no hard and fast rule can be laid down as to the section of the Penal Code applicable, and that the circumstances of each particular case must be taken into consideration.

In 28 P. R. 1881, Plowden, J. remarks:—"The use of *dhatura* in order to facilitate the commission of an offence does not *per se* necessarily import contemplation of the victim's death as a means towards, or as an incidental to, the main end of robbery. Judicial experience shows that numerous robberies are committed with the aid of *dhatura* without fatal results."

In the present case we think that it has not been shown that the appellants administered *dhatura* with such intent or knowledge as would make them guilty of murder. Their offence would fall either under Section 326 or under Section 328, and we think they should be convicted of the graver of those two offences."

The conviction was therefore altered from Section 302 to Section 326, but the sentence of transportation for life was maintained.

(vi) Kesar Din v. Emperor, 3 P. W. R. 1920=55 Ind.
Cas. 479 :

In cases of *dhatura* poisoning it is always necessary to ascertain the object with which *dhatura* was administered ; and the best indication of the intention of the offender can be gathered from the amount of *dhatura* administered.

F. Burma.

Nga Payung v. Queen-Empress, U. B. R. 1897=1901,
Vol. I, 296.

Causing death by the administration of *dhatura* poison in toddy for the purpose of detecting thieves will amount to murder. In this case the accused was charged and convicted of culpable homicide not amounting to murder, but the Judicial Commissioner on appeal observed that having regard to the ignorance of the people and their addiction to old practices, no order need be made for a new trial, and the appeal was merely rejected.

(In a similar case, Dasi Pichigadu, 1 Weir 335. Where death did not ensue, it was held that the accused had committed an offence under Section 328 for having caused an unwholesome drug likely to cause hurt to be administered.)

In Queen v. Kala Chand 10 W. R. Cr. 59, it was held that when a poisonous drug was administered to a woman to procure miscarriage and death resulted, and it was not proved that the accused knew that the drug would be likely to cause death, etc., they were acquitted of murder and convicted of an offence under Section 314.

GENERAL REMARKS.

The Courts are agreed that if poison is administered on the understanding that it is a charm or love potion, and without any knowledge that it is a deadly substance or any intention to cause death or bodily injury, the offence is one under Section 304 A. if death ensues (17 Bom. L. R. 217; 31 A. 290; 39 C. 855; 60 P. R. 1887); and under Section 337, if serious illness follows (19 Bom. L. R. 54).

As is pointed out in 35 P. R. 1884 guilty knowledge or intent cannot be inferred merely from the fact that the substance administered was arsenic; this guilty knowledge or intent must be established either by direct evidence or by inference from conduct and circumstances whether ignorance of the nature and property of the substance administered is pleaded or not; and when it is pleaded, the plea cannot be ignored.

But when a man of mature age administers a substance which he knows to be arsenic, then he may be presumed to know its effects (40 A. 360).

Similarly when *dhatura* is administered (it may be only for the purpose of facilitating a robbery or by reason of a superstition that a thief may be detected thereby) and death ensues, the offence may be murder (20 A. 143; 31 A. 148; 8 P. R. 1869; 32 P. L. R. 1911; U. B. R. 1897—1901, Vol. I, 296). But the offence may be only one under Section 328 or 326 (30 A. 568; 19 P. R. 1919), the tests being whether death followed shortly after the administering of the drug, or not till some time after; and whether or not the persons administering the drug are shown to be experts in such acts and to be well aware of the injurious effect of the drug on their victims. The amount administered is the best indication of the intention with which the *dhatura* was administered (3 P. W. R. 1920).

In poisoning cases it often happens that others are killed than those whom it is intended to kill. The offence is none the less murder (136 M. W. N. 1912; 39 A. 161).

CLASS. IV.—CASES WHERE DEATH HAS BEEN CAUSED TO A CHILD.

(a) Deliberate murder.

(i) Queen-Empress v. Irowa, Rat. Un. Cr. C. 401.

Queen-Empress v. Basapa, ditto (1888).

Where the murder of a newly born child is deliberately committed in cold blood, the murder is as serious an offence in the eye of the law as that of a grown up person and deserves to be as severely punished.

(ii) Mt. Ram Kaur v. The Crown, 145 P. L. R. 1902:

The accused, a widow, left her village in an advanced stage of pregnancy and went to a neighbouring village. She told no one of her condition. Feeling her time approaching she left the village, and was delivered of a living female child in a jungle. She immediately strangled her child by twisting the umbilical cord round its neck and buried the body in the jungle. It was held that the conviction for murder was right, but the Chief Court recommended the Local Government to commute the sentence to one of seven years' imprisonment.

(iii) Mt. Saidan v. Crown, 43 P. W. R. 1910 = 17 P. L. R. 1911 = 8 Ind. Cas. 815 = 11 Cr. L. J. 717:

R gave birth to a female child and S, her mother, alone attended her; and the infant, while in their custody, died of sulphate of copper poisoning soon after its birth. It was held that the presumption was that they, R and S, had administered the poison and that they were guilty of murder even in the absence of a clear motive for committing the crime. The fact of their taking no steps towards saving the infant's life was evidence of intention, and negatived the defence of accidental poisoning, and was sufficient to corroborate their confession of guilt retracted by them at the time of the trial. It was further held that in such a case capital sentence was not justifiable.

(iv) Mt. Budho v. The Crown, 29 P. R. 1915

While it is necessary under English Law that the child should be *completely* emerged to constitute it a human being, Section 299, Explanation 3 of the Indian Penal Code, enacts that it may amount to culpable homicide to cause the death of a *living* child if part of that child has been brought forth, though the child may not have breathed or been completely

born. But even under the Penal Code it must be shown that the child *lived*, as the explanation refers to the death of a living child. According to Taylor (Medical Jurisprudence) it is possible that a child should breathe while still entirely in its mother's womb, and yet die before any part of its body has been brought forth. If it is not homicide to kill a child in its mother's womb, it can hardly be argued that it is homicide to kill (if such an expression can be used) a child that has breathed in the womb, and dies while yet in the womb and has been brought forth still born. It is necessary therefore to prove not only that the child breathed (for that might have been done while it was still entirely in its mother's womb), but that it breathed and was a living child after it had wholly or partially emerged from its mother's womb.

(b) By starvation, exposure or desertion.

(i) Queen *v.* Gunga Singh, 5 N. W. P. 44 :

Where the accused allowed his motherless child, six months old, to languish away gradually and die owing to indifference notwithstanding repeated warnings of the state of the child, it was held that he was guilty of murder.

(ii) Queen *v.* Khoda Bux Faker, 10 W. R. Cr. 52 :

Where a child does not die of the exposure, except in a remote degree, the mother that exposed the child would not be guilty of murder, but only of an offence under section 317. The explanation contemplates cases in which death is caused from cold or from some other result of exposure.

(iii) Mt. Nankee *v.* Crown, 23 P. R. 1866 :

A newly born child was left by its mother in an enclosure near a road and was there discovered by a passer by and shortly after breathed its last. It was held that the mother could not be convicted of murder, the child not having been left on a barren heath or in an unfrequented place, but of an offence under Section 317.

(iv) Mt. Ram Dai *v.* Crown, 18 P. R. 1870 :

Where a woman caused the death of her infant child by purposely abstaining from giving the deceased any nourishment, but did not part with the custody of the child, it was held that she was wrongly convicted under Section 317 and that the Sessions Judge convicting her under Section 304 should have specified the exception under Section 300 which applied.

(v) Empress v. Banni, 2 A. 349 (1880) :

Where a mother exposed an infant child, knowing that such abandonment by her was likely to cause its death, and death ensued in consequence thereof, it was held that she could properly be convicted of culpable homicide under Section 304, and not both under Sections 304 and 317.

(vi) Empress v. Battia, 36 A. W. N. 1883 :

Where it was proved that the accused had wilfully withheld all nourishment from a child with the intention of causing its death, and the child died in consequence, it was held that he was guilty of murder.

(vii) Queen-Empress v. Jeoni, 100 A. W. N. 1893 :

The accused, a young married woman, bore an illegitimate child in her husband's house and left her home ten days after the birth of the child. The child remained and was fed for four days after the mother's departure, partly with cow's milk, partly from the breast of the infant's maternal aunt; and eventually the infant died of weakness probably resulting from infantile diarrhoea. It was held that under these circumstances, the conviction of the accused under Section 304 was not proper.

(viii) Emperor v. Kundan, 43 A. W. N. 1903 :

A woman abandoned her newly born child but left it in a place which was quite close to the village and also near a public road, where, in fact the child was shortly after discovered, it was held that the mother could not be rightly convicted of an attempt to murder, but should rather be convicted of the offence described in Section 317.

GENERAL REMARKS.

Under the English law complete emergence is necessary to constitute the child a human being ; but partial emergence is sufficient under the Indian Penal Code. Under explanation (3) of Section 299 it is not necessary that the child should have breathed or have been completely born, but it must have been a living child. A child may breathe while still entirely in its mother's womb and yet may die before any part of its body has been brought forth. From the mere fact, therefore, that the child has breathed it does not necessarily follow that the breathing took place after it has wholly or partially emerged from its mother (29 P. R. 1915).

A child may live after its birth without respiring, or may respire so imperfectly that it may be impossible by *post mortem* examination to obtain satisfactory proof that respiration has taken place. (Lyon and Waddell, Medical Jurisprudence for India, 5th edition, page 309).

To withhold food from a child is an "illegal omission" as it is the duty of a parent to provide his child with food ; Section 32 enacts that "in every part of the Code, except where a contrary intention appears from the context, words which refer to acts done extend also to illegal omissions." Therefore to starve a child to death is murder (5 N. W. P. 44; 36 A. W. N. 1883).

The exposing or leaving of a child under twelve years of age by the father or mother or person having care of the child in any place with the intention of wholly abandoning such child is an offence under Section 317. The explanation to that section runs as follows :—" This section is not intended to prevent the trial of the offender for murder or culpable homicide, as the case may be, if the child die in consequence of the exposure."

The death must be the direct result of the exposure (10 W. R. Cr. 52), and where the parent knows that the abandonment is likely to cause death and death results, a conviction under Section 304 would be proper (2 A. 349). But if the child is abandoned in a public place or with relations, the offender cannot be convicted under Section 304 if the child dies (100 A. W. N. 1893) nor under Section 307 if the child does not die (43 A. W. N. 1903).

There was one curious case (*Queen v. Mt. Pamkoer*, 5 N. W. P. 38) in which the mother administered milk to her child in such quantity as to kill it, but there was no evidence to show that the mother was aware of it. It was held that she was not guilty of an offence under Section 304 A.

CLASS V.

(a) DEATH CAUSED BY SURGICAL OPERATION.

(i) Surkaroo Kobiraj v. Empress, 14 C. 566 (1887) :

A *Kobiraj* operated on a man for internal piles by cutting them out with an ordinary knife. The man died from haemorrhage.

It was contended that inasmuch as the prisoner had performed similar operations on previous occasions, it was not a rash act within the meaning of Section 304-A, and that at all events he was entitled to the benefit of Section 88, as he did the act in good faith without any intention to cause death, and for the benefit of the patient who had accepted the risk. It was held that as the prisoner was admittedly uneducated in matters of surgery, and having regard to the meaning of "good faith" as defined in Section 52, he was not entitled to the benefit of Section 88, and was guilty under Section 304-A.

(ii) Queen v. Baboolun Hijrah, 5 W. R. Cr. 7 :

Where a man of full age (i.e., above 18 years) submits himself to emasculation, performed neither by a skilful hand nor in the least dangerous way, and death ensues in consequence, the persons concerned in the act are guilty of culpable homicide not amounting to murder.

(b) DEATH CAUSED BY A SNAKE BITE.

(i) Queen v. Poonai Fattemah, 3 B. L. R. A. Cr. 25=12 W. R. Cr. 7 (1869) :

Certain snake charmers, by professing themselves to be able to cure snake bites, induced several persons to let themselves be bitten by a poisonous snake. From the effect of the bite, three of those persons died.

It was held that the offence was murder under clauses 2 and 3 of Section 300 unless it could be brought within the fifth exception to that section. If the prisoners really believing themselves to have the powers they professed to have induced the deceased to consent to take the risk of death, the offence would be culpable homicide not amounting to murder.

This case was distinguished in Empress v. Gonesh Dooley on the ground that the prisoners actually caused the snake to bite the persons, and thus had clear knowledge of the imminent danger that must, in all probability, cause death.

(ii) *Empress v. Gonesh Dooley*, 5 C. 351 (1879) :

A snake charmer exhibited a snake, whose fangs had not been extracted; to show his own skill and dexterity, he placed the snake on the head of a boy; the boy tried to push the snake off, was bitten and died.

It was held that Section 304-A did not apply; the accused did not think that the snake would bite the boy, but the act was done with the knowledge that it was likely to cause death but without any intention to cause death, and therefore the accused was guilty under Section 304.

(iii) *Queen-Empress v. Nga Po Kyin*, U. B. R. 1897—1901, Vol. I, 298 :

Death was caused by the bite of a venomous snake received by deceased's own act through the alleged instigation of a snake charmer.

There was no actual decision but the conviction under Section 336 was quashed, and commitment was ordered under Section 304, with an additional charge under Section 304-A. The following extract is given from the judgment:—"There are two Indian cases in which the circumstances had some resemblance to those of the present case. They are *Queen v. Poonai Fattemah* and *Empress v. Gonesh Dooley*. In the former of these two snake charmers were convicted under Section 304 for having caused the death of three men by making a poisonous snake bite them. It was held that the conviction was right because the case came within exception 5 to Section 300, since the accused must have acted in the belief that the deceased gave their consent with a full knowledge of the facts in the belief of the existence of powers which the prisoners asserted and believed themselves to possess, but "no doubt the deceased gave their consent under a misconception of fact, namely a belief that the prisoners by incantations could heal or protect them from the effects of the bites of venomous snakes." The evidence was that the accused not only gave the deceased repeated assurances of their powers in order to persuade them to let themselves be bitten, but that the accused used force by beating the deceased and that they caused the snake to bite by striking it with a rattan.

In the second case the snake was put on the head of a boy who took fright and was bitten and died. The conviction was under Section 304, the learned Judges observing that Section

304-A. did not apply, for "we consider that the rabs act did amount to culpable homicide. We think that it may be said in this case that Gonesh did not think that the snake would bite the boy, but we think that the act was done with the knowledge that it was likely to cause death but without the intention of causing death."

It will be noticed that in the cases quoted above something direct was done by the accused which had the effect of bringing about the catastrophe, whereas in the present instance this was not so. What the proceedings go to show is that the deceased himself did everything that brought death upon him but they suggest that it was the incitement given by the accused, first by using spells to render him invulnerable to snake bite, and secondly by putting a talisman in his hand and compelling him boldly to lay hold of the snake's head that was the proximate cause of the death.

The question is whether this was so or not and whether the accused by so stimulating the deceased to run the risk did an act which caused death, and did an act causing death which rendered him liable to punishment under the criminal law, and in that event, what is the offence which he had committed. The question in its latter branches involves the question whether the circumstances came within any of the general exceptions in Chapter IV relating to consent."

(c) DEATH CAUSED BY SEXUAL INTERCOURSE.

~~(i)~~ Queen-Empress v. Haree Mohan Mythee, 18 C. 49 (1890) :

A fully developed adult caused the death of his wife, aged 11, who had not attained puberty; death was caused by haemorrhage from a rupture of the vagina caused by the person having sexual intercourse with the girl.

"If the jury were of opinion : (a) that the act of the person caused the death of the girl, i.e., that the act of cohabitation on the part of the prisoner had the effect of rupturing the vagina and so causing haemorrhage which led to her death; (b) that the act of cohabitation between a fully developed man and an immature girl was in itself a thing likely to lead to dangerous consequences; (c) that the act was one of such a character as to indicate a reckless indifference to the welfare of the girl or a want of reasonable consideration about what the prisoner was doing, or which the husband, if he had had a reasonable regard to

her welfare and had exercised reasonable thought as to the act he contemplated doing, would have abstained from doing they would be justified in finding that the prisoner caused the death of a girl by a rash and negligent act."

The jury found the accused guilty under Section 338.

(ii) *Crown v. Shahu*, 11 S. L. R. 76 (1917)=42 Ind. Cas. 731 = 18 Cr. L. J. 1003:

The husband, a fully developed adult man had sexual intercourse with his child wife, who was an immature girl, and he did it with such violence as to rupture the vagina and destroy the partition between the vagina and the rectum, and the wife died in consequence; it was held that he had committed an offence under Section 304-A. as he did a dangerous act with a wanton disregard as to the consequences of intercourse with his wife and so caused her death.

"The case is very similar to that of *Queen-Empress v. Haree Mohun Mythee*. In that case Wilson, J. observes :— 'Under no system of law, whether Hindu or Mohammadan, or that framed under British rule, has it ever been the law that a husband has the absolute right to enjoy the person of his wife without regard to the question of safety to her.'

If the accused knew that intercourse with his child wife was likely to cause death, he would be guilty of culpable homicide. That knowledge is not imputed to him by the prosecution, but what is implied is that though the act was lawful he did it with that recklessness and indifference which constitutes criminal rashness.

On this point the facts speak for themselves. He was a fully developed adult and his wife was an immature girl. He must have known that the act was a dangerous one and yet he did it with such violence as to rupture the vagina, and destroy the partition between the vagina and the rectum. It is clear therefore that he did a dangerous act with a wanton disregard as to the consequences to his wife and so caused her death."

CHAPTER III.

SPECIAL EXCEPTIONS TO SECTION 300.

If it is proved that the offence committed falls under any of the four clauses of Section 300, it is murder unless the accused can prove that circumstances exist bringing the case (1) within any of the general exceptions in the Indian Penal Code and (2) within any special exception or provision contained in any other part of the same code. (Evidence Act, Section 105).

The special exceptions given in Section 300 will be dealt with in this chapter.

EXCEPTION No. 1.

When a person accused of murder relies upon the first exception to Section 300, the first question is whether he was deprived of self-control; if he was not so deprived, then however grave and sudden the provocation it will not avail him as an excuse for his acts (*Ghausar v. Empress*, 33 P. R. 1884). It is not a necessary consequence of anger or other emotion that the power of self-control should be lost. Except where unsoundness of mind or real fear of instant death is proved, the pressure of temptation is no excuse for breaking the law. (*Queen-Empress v. Devji Govindji* 20 B. 215; 1895).

It is incumbent on an accused person, who seeks to reduce the nature of his crime, by bringing his case under this exception, to prove that the provocation received by him was such as might reasonably be deemed sufficient to deprive him of his self-control and that the killing took place whilst that absence of self-control lasted and may fairly be attributed to it. (*Local Government v. Hanuman Parshad*, 14 C. P. L. R. 188).

The provocation and its effects must be proved to have been sudden as well as grave, and the deprivation of self-control must be shown to continue.

(*Queen v. Bechoo Saout*, 19 W. R. Cr. 35).

In cases of this kind the immediate object of the inquiry is whether the suspension of reason arising from sudden passion continued from the time of the provocation received to the very instant of the mortal stroke given, for if from any circumstance whatever it appears that the party reflected, deliberated or cooled any time before the

fatal stroke was given, or if, in legal presumption, there was time or opportunity for cooling, the killing will amount to murder, as being attributable to malice and revenge, rather than to human frailty.

(Russell on Crimes and Demeanours, quoted in 8 A. 635).

Similarly in Queen-Empress *v.* Dhira, Rat. Un. Cr. C. 122 (1877):—

The Court has to decide whether, between the cause of the grave and sudden provocation and the dealing of the fatal blow, there was time for the blood to cool and for reason to resume its seat.

An act which might not seriously provoke a sober man might provoke a drunken man to an extremity of frenzy. Death caused by a drunken person deprived of the power of self-control by grave and sudden provocation amounts to culpable homicide not amounting to murder. (2 L. B. R. 204; Nga San *v.* King-Emperor).

One class of case in which this exception is applied is that in which a husband finds his wife committing adultery with another man and kills one or both of them on the spot. In the following cases of this description the exception has been held applicable :—

Queen-Empress *v.* Asha Gopal; Rat. Un. Cr. C. 932 (1897).

Queen *v.* Gour Chunder Poli, 1 W. R. Cr. 17.

Empress *v.* Damarua, 197 A. W. N. 1885 (see this referred to below under 8 A. 622).

Queen *v.* Ramtahal Kahar, 3 B. L. R. Cr. 33 (1869).

Fazal *v.* Queen-Empress, 8 P. R. 1899.

Ajudhi *v.* Emperor, 16 Cr. L. J. 625 = 30 Ind. Cas. 449.

Said Ali *v.* Empress, 8 P. R. 1890.

Sahib *v.* Empress, 27 P. R. 1900.

In the last case a more severe sentence than is usual in such cases, namely three years' imprisonment, was given because the accused had killed the deceased in an unusually brutal and determined manner by strangulation.

In Hussun *v.* Crown, 30 P. R. 1872, the husband had previously suspected his wife of intrigue with the deceased

and being informed that they had arranged a meeting, followed them armed with a stick and caught them in the act of committing adultery. The husband pursued the deceased for 50 paces, beat him very severely and killed him.

The sentence awarded was three years' imprisonment because, it was held, he must be punished with greater severity than if he had killed the adulterer while actually in the act and without showing a spirit of revenge.

In Gohra Queen-Empress, 7 P. R. 1890, the accused had been well aware for some years that his wife had an intrigue with the deceased and was on the look out for an opportunity to surprise her. His suspicions being aroused, he followed them with a knife and seeing them in each other's arms, killed the paramour. It was held that the exception did not apply and the accused was not deprived of his self-control.

A similar case was Gosain *v.* Emperor, 18 A. L. J. 851 = 57 Ind. Cas. 175 (1920).

The following are instances where the exception was pleaded in cases wherein the wife and her lover were not caught *flagrante delicto* or killed while committing the act or immediately after.

A.—Exception applied :—

(i) Queen *v.* Sheikh Boodhoo, 8 W. R. Cr. 38 :

The accused stated that he had been married to his wife for ten years and had no reason to suspect her fidelity; that he left home, and on his return he saw what convinced him that his wife was not as he had hitherto believed her to be and that maddened at the sight he killed both her and her paramour.

It was held that he was guilty of culpable homicide not amounting to murder and that the case was one deserving to be leniently treated.

(ii) Boya Munigadu *v.* Queen, 3 M. 33 (1881) :

The accused saw, on the evening preceding the commission of the act charged, the deceased having connection with his wife, and on the following morning he saw his wife eating with the deceased and giving him food, while she left him without it, and thereupon the accused killed the deceased on the spot with a bill hook. It was held that if, having witnessed the act of adultery, the accused connected the subsequent conduct, as he could not fail to connect it, with that act, the conduct amounted to provocation grave enough and sudden enough to deprive him

of self-control and reduced the offence to culpable homicide not mounting to murder, inasmuch as the conduct of the deceased and his wife was of a character highly exasperating to him, implying that all concealment of their criminal relations and all regard for his feelings were abandoned, and that they purposed continuing their course of misconduct in his house.

(iii) *Abalu Das v. King-Emperor*, 28 C. 571 (1901).

The deceased H lived in the house of the accused A. H contracted an intimacy with L, the wife of A, in consequence of which he was turned out of the house. Subsequently on a certain night, H, at the invitation of L, went to the house of A and was taken inside by her. Thereupon A and the other accused, relatives of his, seized H, carried him off to some distance, beat him, broke his arms and left him. It was held that the circumstances were sufficient to cause grave and sudden provocation to A and his relatives within the meaning of the exception, and that the provocation was of such nature that would continue to influence the feelings of the accused for a considerable period after H was caught in the house in the company of L.

(iv) *Ralia v. King-Emperor*, 3 P. R. 1913:

The accused, a weak looking youth of about 17 years of age (his wife being 35) on his unexpected return to his house, found the paramour of his wife coming out of the house, and on remonstrating with his wife was further annoyed by her reception of his remonstrances, and killed her with a hoe.

It was held that the circumstances under which the accused killed his wife brought his act within the first exception.

B.—Exception not applied:—

(i) *Queen v. Yasin Sheikh*, 12 W. R. Cr. 68 = 4 B. L. R. Cr. 6 :

A finds B in bed with his wife. A beats B, takes him away to some distance from the house and cuts off his head. This is murder.

(See *contra* 28 C. 571 above).

(ii) *Empress v. Rogi*, 112 A. W. N. 1881 :

The mere fact that a man who, having found another sleeping with his wife, killed her on the spot, called aloud

at the time for assistance, did not necessarily indicate that he had not acted under grave and sudden provocation. If however, in such a case, having called his servants to his assistance, he had compelled them to hold his wife's paramour while he deliberately proceeded to kill him, he would not be entitled to the same amount of consideration, and his crime would properly fall under the category of murder.

(iii) *Queen-Empress v. Mohan*, 8 A. 622 (1886):

Accused had entertained well founded suspicions that his wife had formed criminal intimacy with another person; one night the deceased thinking that her husband was asleep stealthily left his side; the accused took an axe and followed her and found her in conversation with her paramour in a public place and killed her. It was held that the act constituted the crime of murder, the facts not showing grave and sudden provocation. The case of *Queen-Empress v. Damarua*, Weekly Notes 1885, p. 19 (197 A. W. N. 1885) was referred to as follows:—

"I have already in the case of Damarua gone to the extreme limit that I am prepared to go in cases of this description in holding upon the facts there disclosed that the husband's offence in killing his wife or paramour or both was by reason of grave and sudden provocation reduced from murder to manslaughter. In that case the circumstances were of such a character and description that there were reasonable grounds for the accused believing or imagining that an act of adultery had been committed immediately before he saw his wife with her paramour; and I therefore though not without doubt and with some elasticity applied the principle which has been sanctioned in cases of this description by the rulings of the most eminent English Judges."

Other cases in which the conduct of a wife was put forward as an excuse are—

A.—Exception not applied :—

(i) *Queen v. Boora*, 125 P. R. 1866:

The sentence of death was confirmed in a case in which the wife had been murdered, the motive alleged being her bad character.

(ii) Queen v. Mohun 122 P. R. 1866

The accused whose wife had separated from him, finding her living with his friend, the deceased, and suspecting that he was the cause of the separation, murdered him. The sentence of death was confirmed as it appeared that the separation was caused by the accused's own brutality and vicious propensities, and there was no evidence to show that the suspicion that the deceased was the cause of the separation was well founded.

(iii) Government Pleader v. Nattekallappa, 1 Weir 308, (1886):

The refusal of a wife to let the husband have connection with her does not amount to grave and sudden provocation.

(iv) Queen-Empress v. Dadu Bhai, Rat. Un. Cr. C. 766 (1895):

The fact that the accused was angry at his wife's resistance to the act of sexual intercourse is not such a provocation as would make his causing her death an offence less grave than murder. Her denial of a charge of adultery is not sufficient to constitute grave provocation; and the irritable or revengeful state of mind caused by mere jealous suspicions is not a fact which makes the homicide less than murder.

(v) Ramzan v. Emperor, 108 P. L. R. 1902:

The Sessions Judge was of opinion that the accused's anger was partially inflamed by a suspicion that the deceased had an intrigue with another person and in addition to this she refused him sexual intercourse with her, called him a dog and threw him on the ground from her cot. It was held upon the facts proved that the accused was guilty of murder.

B.—Exception applied :—

(i) Fuzl Shah v. Crown, 87 P. R. 1866 :

The accused's wife had previously eloped and after her husband had brought her back she persistently refused to cook his food or to eat or to cohabit with him.

One Judge held that the accused was so incensed and provoked by the deceased as to take the culpable homicide of the woman out of the category of murder.

The other Judge agreed with this finding but on the theory that there was no intention to kill.

(ii) *Empress v. Bansi*, 105 A. W. N. 1881:

When the accused came home hungry expecting to find his dinner ready and was in a hurry to get back to his field, the wife's refusal to cook his dinner accompanied with words of abuse, was held to be such grave and sudden provocation as deprived him of the power of self-control.

(iii) *In re Venkatasan*, 1 Weir 307 (1882):

The accused, who heard that his wife gave betelnut to a certain person, subsequently saw her and that person weeding in a field side by side and their bodies frequently coming in contact. He upbraided his wife for it but she told him that she would do just as she liked, and that there were thousands of men as good as he. Upon this he killed her in a passion with a *mamoti* which he had with him. It was held that the conduct of his wife amounted to grave and sudden provocation of such a character as to reduce the killing to culpable homicide not amounting to murder.

The following are cases in which the misconduct of a sister has been pleaded as an excuse:—

A.—Exception applied:—

(i) *Queen v. Kasseemoddeen, Kurreemoddeen*, 4 W. R. Cr. 38:

The prisoners found the deceased lying in the same bed with their sister and ill-treated him, from the effects of which illtreatment he died. It was held that the provocation was sufficiently grave to justify a conviction of culpable homicide not amounting to murder.

(See also *Queen v. Maithya Gazee*, 6 W. R. Cr. 42).

(ii) *Queen-Empress v. Chunni*, 18 A. 497 (1895):

The accused found his sister having illicit intercourse with a man and killed them both on the spot.

"Of course there is a difference between the provocation which a man receives when he finds another man committing adultery with his wife, and the provocation which he receives when he finds his sister dishonouring his family by having illicit intercourse with a man; still the latter provocation cannot in common sense and in one's experience of the world be looked upon as a light one."

(iii) *Fazl Dad v. King-Emperor*, 4 P. R 1904 :

The accused caught the deceased in the act of adultery with his married sister and struck him one blow on the head with a stick which killed him fracturing his skull. It was held that the accused had undoubtedly acted under grave and sudden provocation and on an uncontrollable impulse and under such circumstances a sentence of one year's imprisonment was considered sufficient.

(iv) *Jafar v. King-Emperor*, 140 P. L. R. 1905 = 2 Cr. L. J. 705 :

The accused saw his sister and her paramour coming out of the *hujra* of a mosque and receiving an insulting answer from the latter, there and then attacked and killed him. It was held that the provocation was both grave and sudden, and the sentence was reduced to one of rigorous imprisonment for four years.

B.—Exception not applied :—

(i) *Crown v. Mohamed*, 107 P. R. 1866 :

The accused on information received had gone in search of his sister and her paramour, expecting to find them together and on finding them sleeping together at the paramour's cattle enclosure killed them both.

It was held that the fact of his having gone thus armed and of his having had reason to know of his sister's bad character supported the finding that there was no provocation sufficiently sudden to reduce the offence to culpable homicide not amounting to murder, but that as the injury to the feelings of the accused was great, the sentence was reduced to transportation for life.

(ii) *Crown v. Rahim Khan*, 7 S. L. R. 118 = 15 Cr. L. J. 501 = 24 Ind. Cas. 589 (1914) :

Accused met his sister and a stranger not far from the house and took no immediate action but quietly brought them home and sat down and talked with them, and, after satisfying himself that there were grounds for suspicion, deliberately fell upon them and killed them.

It was held that the facts of the case did not disclose either grave or sudden provocation within the meaning of the exception, and that a Baluch custom justifying the accused in taking the life of his sister was no ground for mitigation of sentence.

In the following case the misconduct of a female other than a wife was pleaded :—

Queen-Empress v. Lochan, 8 A. 635 (1885):

The accused followed the widow of his cousin, who was living with him, for a considerable distance armed with a *gandasa* under circumstances which indicated a belief on his part that she was going to keep an assignation and with the purpose of detecting her in doing so. He found her in the act of connection with her paramour, and killed her. It was held that the accused was guilty of murder as he went deliberately in search of the provocation sought to be made the mitigation of his offence, and under the circumstances disclosed it could not be said that he was deprived of self-control by grave and sudden provocation.

Other cases in which grave and sudden provocation has been pleaded are here given :—

A.—Exception not applied :—

(i) Crown v. Sumundur, 4 P. R. 1872 :

The deceased solicited the accused to continue a criminal intercourse which had existed between them; on his declining she kicked him, whereupon he struck her a blow over the region of the heart, throttled her till she ceased breathing and threw her body in the well. Held that there was no grave and sudden provocation.

(ii) Ganduva Nayako, appellant, 1 Weir 305 (1882) :

The accused had been ill for three or four months and attributed his illness to witchcraft practised upon him by his brother and caused the latter's death. It was held that the provocation arising out of the belief that he was bewitched by his brother, even if it were real provocation, was not so sudden as to reduce the offence to culpable homicide not amounting to murder.

(iii) Ghuntappa, accused, 1 Weir 306 (1882) :

The accused's concubine had left him for another connection, which she refused to abandon notwithstanding his remonstrances. When she left at the termination of their last interview, he went after her and killed her with a dagger which he had purchased with the intention of killing her. It was held that, although her

conduct may have been a grave source of provocation, it was not a provocation of a sudden...character, or such as the law could take into account in determining the legal aspect of the offence.

(iv) *Moni Prodhan, Prisoner, 1 Weir 306 (1882)*:

The accused had been injured by the deceased in many ways extending over many years and killed him.

It was held that the provocation was not so grave and sudden as to reduce the offence to culpable homicide not amounting to murder.

(v) *Empress v. Girwar, 297 A. W. N. 1886*:

The accused a Brahman, and the deceased, a Chumar, were prisoners in the Jail and were employed in digging up radishes. The accused pulled up a radish and began eating it and the deceased abused him for doing so calling him *bahin chod* or *beti chod*, whereupon the appellant struck him four blows with his spade and caused his death.

It was held that although the language used by the deceased, a Chumar, to the Brahman was of a very abusive and offensive character, it would not amount to the grave and sudden provocation meant in Exception 1.

(vi) *Queen-Empress v. Nga Tun, I. L. B. R. 46 (1900)*:

B struck A certain blows with a stick. A then ran into C's house ; meanwhile B went into D's house and there gave up his stick and clasp knife. A then came out of C's house and was joined by his father E who inquired who had beaten his son. Both father and son went into D's house. The father E seized and held B and directed his son A to "do it" on which the latter unclasped a knife and stabbed B in the neck and caused almost instant death. It was held that A could not claim the benefit of the first exception, as it cannot be said that if a man who escapes from a beating runs into another house, is joined by his father and points out his assailant, and then at his father's direction stabs his assailant after opening a clasp knife, he is deprived of the power of self-control by grave and sudden provocation.

(vii) *Nga Maung v. King-Emperor, 4 L. B. R. 132 = 7 Cr. L. J. 410 (1907)*:

A mere breach of etiquette cannot be held to constitute grave and sudden provocation excusing a person losing all power of self-control, viz. using taunting words to appellant containing an innuendo derogatory to his sister's virtue.

B.—Exception applied :—

(i) *In re Kither Khan*, 5 M. L. T. 207 = 4 Ind. Cas. 1116 = 11 Cr. L. J. 191 (1910) :

There was a fight between the deceased and the accused, but the deceased struck the first blow, and no motive sufficient to induce the accused deliberately to murder the deceased was proved. It was held that the accused was guilty of culpable homicide only, though the deceased died as a result of the injuries inflicted by the accused.

(ii) *A We v. Queen-Empress*, U. B. R. 1897—1901, 291 :

Appellant found three youths stealing pineapples from his garden. He chased them and overtaking one of them cut him down with a *da*. It was held that the law should be interpreted liberally in favour of the accused in such a case if he has acted in good faith for the protection of his person and property, though he has acted in excess of his legal rights ; and the appellant was reasonably entitled to the benefit of Exception 1 to Section 300, having acted under the excitement of grave and sudden provocation.

(iii) *Murugaya Nadan v. Emperor*, 9 M. L. T. 480 = 12 Cr. L. J. 235 = 10 Ind. Cas. 262 (1911) :

A, the deceased, came out of his room in a challenging manner to meet M and was fighting with him. S, the father of M, interfered. A gave a severe stab on left side of S's chest and also wounded M. M gave A a blow with his knife and caused A's death. Held that M was under provocation which was grave enough to deprive him of his self-control, and that he was guilty of culpable homicide not amounting to murder.

(iv) *Empress v. Khogayi*, 2 M. 122 :

Foul abusive language addressed to a man already justly enraged was held to be sufficient provocation.

EXCEPTION No. 2.

This exception will be discussed together with the general exceptions relating to private defence.

EXCEPTION No. 3.

The term "public servant" is defined in Section 21, and the term "good faith" in Section 52.

The term "public servant" is discussed at greater length in Chapter VI.

In a case when a police officer, after ordering some reapers to disperse which they refused to do, ordered a constable to fire on them, it was found that neither the police officer nor the constable believed that it was necessary for the public security to disperse the reapers by firing on them, and therefore they were not acting in good faith, and the order to shoot was illegal and did not justify the constable ; therefore both he and the police officer were guilty of murder.

(Queen-Empress v. Subba Naik, 21 M. 249 (1898).)

The following passages are quoted in this ruling :—

“The degree of force which may be lawfully used in the suppression of an unlawful assembly depends on the nature of such assembly ; for the force used must always be moderated and proportioned to the circumstances of the case and the end to be obtained ” (Lord Bower’s Report on the Colliers’ Strike and Riot, 1893).

“The taking of life can only be justified by the necessity for protecting persons and property against various forms of violent crime, or by the necessity of dispersing a riotous crowd which is dangerous unless dispersed.”

(Keighly v. Bell, 4 F. and F. 763 at p. 790 ; Rex v. Suddis 1 East 306 at p. 312 ; and Alexander Broadfoot’s case, Foster’s Crown Law, 154.)

The exception has no application to acts outside the duty of a public servant, and a constable, therefore, who has demanded money from some gipsies, and on their refusal, ordered one of them to be bound and taken to the *thana*, and then fired on the other gipsies who had assembled, before any violence was used, was held to stand in no better position than a private person, himself having provoked the gipsies by his illegal and improper procedure. (Empress of India v. Abdul Hakim, 3 A. 253, 1881.)

EXCEPTION No. 4.

An unpremeditated assault, ending in an affray in which death is caused, committed in the heat of passion upon a sudden quarrel, comes within this exception. It does not matter which party offered the provocation or committed the first assault.

(Queen v. Zalim Rai, 1 W. R. Cr. 33.)

A fight *per se* is not a palliating circumstance : it must be unpremeditated (Empress v. Rahim-ud-din, 5 C. 31, page 34).

But mere absence of premeditation will not reduce a crime from murder to culpable homicide not amounting to murder.

(Queen v. Mahomed Elim, 3 W. R. Cr. 40.)

If a person snatches up a heavy log of wood and strikes another with it on a vital part, with so much force and vindictiveness as to cause that other person's death almost on the spot, that act must be held to have been done with the knowledge that it was likely to cause death, but if the act is done without forethought, in the heat of passion and on a sudden quarrel, the offence committed is culpable homicide not amounting to murder.

(Queen v. Rajoo Ghose, 7 W. R. Cr. 70.)

Where the accused seven in number entered a field in which the deceased and his friends were working, armed with sticks, some of them being iron bound, in order by force to make them desist from cultivating the field, and a fight ensued in which the deceased received a *lathi* wound on the head at the hands of one of the accused, of which he died in a few days, it was held that as it was not in evidence that the accused desired or premeditated the death of the deceased, and as there was a fight in which the parties became heated with sudden passion, and the weapons used were not unusual and were not applied with unfair advantage or peculiar cruelty, the offence came within this exception.

(Empress v. Sheonandam, 156 A. W. N. 1881.)

Where in the course of a faction fight, the accused inflicted a fatal wound on the deceased, who was not actually engaged in the fight and who cried out that he was unarmed, it was hardly safe to assume that the accused, in the heat of the fight, when he had himself probably been wounded already, could be aware that the deceased had no offensive intention, and could have heard that the deceased was unarmed. The accused was given the benefit of this exception.

(Nga Thwe v. Emperor, 4 Bur. L. T. 17 = 13 Cr. L. J. 272 = 14 Indian Case 656.)

The exception does not apply if the offender has taken any undue advantage or acted in a cruel and unusual manner, e.g. by use of a dagger or sharp instrument. (*In re Tangara*, 1 Weir 303; 1881.)

It has been held that if two men are fighting and one of them is unarmed while the other uses a deadly weapon the one who uses such a weapon must be held to take an undue advantage and is not entitled to the benefit of this exception.

(King = Emperor *v.* Po Kin, 2 L. B. R. 320 (1904) = 1 Cr. L. J. 1128, overruling 371 and 463 L. B. R. 1872—1892; Queen-Empress *v.* Nga Shwe Thau; 271 L. B. R. 1872—1892; Kwin Ya *v.* Queen = Empress, 459 L. B. R. 1893—1900.)

Similarly it has been held that if two men fight with their hands or with weapons of a similar kind, and one of them uses also a weapon of a distinctly advantageous kind, such as a pistol, a dagger or a heavy club, he takes an undue advantage over his opponent, and is not protected by the fourth exception.

(Nga Min Po. *v.* Queen-Empress, U. B. R. 1897—1901, Vol. I, 288.)

In re Mandru Gadaba, 38 M. 479 (1915), the deceased had only a small stick like a cane, while the accused fell on him with a *tangi*, a sort of battle-axe ordinarily used by the hillmen. Ayling, J., was of opinion that the accused took an undue advantage and acted in a cruel and unusual manner and was precluded from availing himself of this exception.

Tyabji, J., on the other hand was not satisfied that the accused had taken any undue advantage or acted in a cruel and unusual manner.

The question in this case was complicated by the fact that the accused was intoxicated and by the discussion as to the applicability of Section 86.

In Mahomed Khan and Fazal Khan *v.* The Crown, 12 P. R. 1869, it was held that the exception did not apply because there was no fight, and because undue advantage was taken by the prisoners, both in the use of the knife and by one of the prisoners holding the deceased's arm down by his side while the other stabbed him.

In *In re* Muthumada Nadan, 16 Cr. L. J. 747 = 31 Ind. Cas. 347 (Mad. 1915), it was held that exception 4 cannot apply when the accused used a knife when there was no appreciable risk of even serious hurt to his person.

An instance of acting in a cruel and unusual manner is found in Crown *v.* Sumundur, 4 P. R. 1872 :—The deceased had

solicited the accused to continue a criminal intercourse which had existed between them and on his declining, she kicked him, on which he struck her a blow over the region of the heart, throttled her till she ceased bleeding and then threw her body in a well. It was held that this exception could not apply as the prisoner had acted in a cruel and unusual manner after he had once felled the deceased to the ground.

EXCEPTION No. 5.

The question whether this exception is applicable to a case of a premeditated fight was discussed by the Calcutta High Court in *Emperor v. Rohimuddin*, 5 C. 31 (1879); *Samshe Khan v. Empress*, 6 C. 154 (1880); *Queen = Empress v. Nayamuddin*, 18 C. 484 (1891).

In the first of these rulings, it was held that the exception refers to cases when a man assents to submit to the doing of some particular act either knowing that it will certainly cause death or that death will be the likely result; but it does not refer to the running of a risk of death from something which a man intends to avert if he can possibly do so even by causing the death of the person from whom the danger is to be anticipated; therefore it was held that it was not applicable to the case of a premeditated fight.

In *Samshe Khan v. Empress* the exception was applied in a case of a fight between two bodies of men deliberately fighting together, but this finding was dissented from in *Queen-Empress v. Nayamuddin*. Therein it was held that this exception should receive a strict and not a liberal construction; and in applying it, it should be considered with reference to the act consented to or authorised, and next with reference to the person or persons authorised, and as to each of those, some degree of particularity at least should appear upon the facts proved before the exception can be said to apply. It must be found that the person killed, with a full knowledge of the facts, determined to suffer death and take the risk of death, and that this determination continued up to and existed at the moment of his death.

These three rulings are discussed by Mr. Mayne in paras. 445—447 of his Criminal Law of India. He appears to doubt the entire correctness of the judgment in 18 C. 484.

The question does not seem to have come up again in any of the Courts of India, nor does there appear to have been any subsequent attempt to apply the exception to fights between two armed bodies; it is not therefore necessary to discuss the question further. It suffices to say that as Mr. Mayne points out, the Judges in 18 C. 484 agreed in thinking that duelling or fights of a similar character, between two combatants meeting each other with deadly weapons, come within the exception. They also agreed that the same rule would apply to larger numbers, if the facts made out "that the deceased did, within the meaning of the exception, consent to suffer death or take the risk of it, at the hands of any person who might be a member of the hostile party." What they all laid down was that the question whether, in any particular case of conflict between two bodies of armed men, the deceased had consented to take the risk of death, was not a matter of law, to be necessarily inferred from the fact that he formed part of an armed body meeting a similarly armed body, but was a question of fact depending on the circumstances of his particular case.

In *Sumshere Khan v. Empress*, 7 C. L. R. 158, it was held that the exception extends to the case of an armed man who deliberately fights with another armed man, and thereby consents to take the risk of death.

It must be shown that the person whose death was caused consented to have the act which caused death done upon him knowing that it would cause his death or that his life would be endangered thereby. It is not sufficient merely to satisfy the Court that the person whose life he took voluntarily took the risk of death. So, where M voluntarily entered the compound of N's house and rushed at N, knowing that the latter had a knife in his hand, and knowing that N had threatened to stab him if he came to the house, and in the course of the struggle M. was fatally stabbed, it was held that N was guilty of murder and that the exception was not applicable.

(*Po Set. v. King-Emperor*, 5 L. B. R. 160 = 11 Cr. L. J. 345 = 5 Ind. Cas. 988; 1909.)

When a man of full age (*i.e.* above 18 years) submitted himself to an emasculation, performed neither by a skilful hand, nor in the least dangerous way, and death ensues in consequence, the persons concerned in the act are guilty of culpable homicide not amounting to murder.

(Queen v. Baboolun Hijrah, 5 W. R. Cr. 7)

When the accused was found to have killed his stepfather, who was an infirm old man and an invalid with the latter's consent, his motive being to get three innocent men hanged; it was held that the offence was covered by this exception and was punishable under part 1 of Section 304.

(Ujagar Singh v. Crown, 45 P. R. 1917.)

Where certain snake charmers by professing themselves to be able to cure snake bites induced several persons to let themselves be bitten by a poisonous snake, and three of those persons died it was held that the offence was murder under clauses 2 and 3 of Section 300 unless it would be brought within the fifth exception. If the prisoners, really believing themselves to have the powers they professed to have, induced the deceased to consent to take the risk of death, the offence would be culpable homicide not amounting to murder.

(Queen v. Poonai Fattemah, 3 B. L. R. A. Cr. 25 = 12 W. R. Cr. 684, 1369.)

(See Chapter II, class V (b).)

CHAPTER IV.

ACTING RASHLY OR NEGLIGENTLY.

336. Whoever does any act so rashly or negligently as to endanger human life or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to three months or with fine which may extend to two hundred and fifty rupees or with both.

337. Whoever causes hurt to any person by doing an act so rashly and negligently as to endanger human life or the personal safety of others shall be punished with imprisonment of either description for a term which may extend to six months or with fine which may extend to five hundred rupees or with both.

338. Whoever causes grievous hurt to any person by doing an act so rashly or negligently as to endanger human life or the personal safety of others shall be punished with imprisonment of either description for a term which may extend to two years or with fine which may extend to one thousand rupees or with both.

304 A. Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both.

(This section was added by Act XXVII of 1870).

The object of the Legislature in framing Section 336 was to render criminal the doing of any act so rashly and negligently as to endanger human life or the safety of others. The mere doing of an act so "rashly and negligently" was made an offence. Section 337 enables a Court to impose greater punishment when hurt is the result of such criminal rashness or negligence. Similarly Section 338 provides for a still further enhanced punishment when under similar circumstances grievous hurt is the result. The original code made no provision for death being caused by such a rash and negligent act. Section 304 A does nothing more than supply the omission by rendering a person or persons, who caused the death of another by a rash or negligent act under circumstances not amounting to culpable homicide, liable to imprisonment up to two years or fine or both.

The words "rash or negligent act" in Section 304 A must have the same meaning as the words "doing any act so rashly

or negligently" which are found in Sections 336, 337, 338, although the phraseology is slightly different.

(Emperor *v.* Morgan, 36 C. 302).

The words "rash or negligent act" were considered and explained by Holloway, J. in *In re Nidamarti Nagabhushanam*; (1872, 7 Mad. H. C. 119, 120=1 Weir 324).

"Culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow but with the hope that they may not, and often with the belief that the actor has taken sufficient precautions to prevent their happening. The imputability arises from acting despite the consciousness. Culpable negligence is acting without the consciousness that the illegal or mischievous effect will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon him, and that, if he had, he would have had the consciousness. The imputability arises from the neglect of the civil duty of circumspection".

This definition was cited in 36 C. 302, and also by the Punjab Chief Court in Kamruddin *v.* Crown, 22 P. R. 1905.

With these introductory remarks, I will proceed, in the method previously followed, to detail cases in which these sections have been applied or considered and then conclude with some general remarks.

A. Bombay.

(i) *Reg. v. Bawaji, Rat. Un. Cr. C. 63 (1872).*

When a person is beaten and death ensues on account of the rupture of a diseased spleen, the offence is one under Section 321 and not under Section 304 A.

(ii) *Reg. v. Radkia Badru, Rat. Un. Cr. C. 67 (1872).*

Where, being insulted in a drunken brawl, the accused threw down the deceased and stamped his feet on his body and death ensued in twenty days, the offence was one under Section 323 and not under Section 304 A.

(iii) *Government of Bombay v. Malkaji, Rat. Un. Cr. C. 198 (1884).*

Where a person allowed his cart to proceed unattended along the road and run over a boy who was sleeping on the road, he could not be convicted under Section 279 but under Section 337 or 338.

(iv) *Queen-Empress v. Bali, Rat. Un. Cr. C. 396 (1888).*

When the accused was alleged to have been negligent either in rashly driving or in leaving his bullocks to go along the road unattended and a child was run over and killed, it was held that the accused ought to have been tried under Sections 304 A, 279 and 289.

(v) *Queen-Empress v. William Keegan, Rat. Un. Cr. C. 673 (1893).*

When the accused threw his stick at the deceased, with such force that it hit him on the head with the point, and made a punctured wound which caused his death, it was held that the accused was not liable to be punished under Section 304 A, because the injury was intentionally caused to the deceased.

(vi) *Queen-Empress v. Hasan, 2 Bom. L. R. 613 (1900).*

Section 304 A refers to rash and negligent acts and does not apply to cases where hurt is voluntarily caused.

(vii) *King-Emperor v. Heera Joeeta, 3 Bom. L. R. 394 (1901).*

Section 304 A is not intended to cover cases where there was an intention to cause hurt. Neither that section nor those relating

to culpable homicide apply to cases when death has arisen, not from the negligent or rash mode of doing the act, but from some result supervening the act which could not have been anticipated

(viii) King-Emperor *v.* Timmappa, 3 Bom. L. R. 678 (1901).

Two men, the accused and the deceased, went into a jungle shikaring porcupine. They agreed to take up certain positions in the jungle and lie in wait for game. After a while, the accused heard a rustle, and believing it was a porcupine, fired in that direction. The shot, however, reached his companion and caused his death. The Magistrate convicted the accused under Section 304 A. It was held, reversing the conviction and sentence, that the accused was protected by Section 80, the affair being a pure accident; and that the fact that he was shooting with an unlicensed gun would not affect his immunity under that section.

(ix) Emperor *v.* Omkar Rampratap, 4 Bom. L. R. 679 (1902).

To impose criminal liability under Section 304 A it is necessary that the death shall have been the direct result of a rash and negligent act of the accused, and that act must have been the proximate and efficient cause without the intervention of another's negligence. It must be the *causa causans*; it is not enough that it may have been the *causa sine qua non*.

(x) Emperor *v.* Istlingapa Shivapa, 14 Bom. L. R. 887 = Cr. C. 183 = 13 Cr. L. J. 798 = 17 Ind. Cas. 542 (1912).

Section 304 A does not apply to a case where injuries are inflicted neither rashly nor negligently, but intentionally and designedly.

(xi) Emperor *v.* Gulam Hyder Punjabi, 39 B 523 (1914).

The accused, an Hakim, performed an operation with an ordinary pair of scissors on the outer side of the upper lid of the complainant's right eye. The operation was needless and performed in a primitive way, the most ordinary precautions being entirely neglected. The wound was sutured with an ordinary thread. The result was that the complainant's eyesight was permanently damaged to a certain extent. The accused was on these facts convicted by the Magistrate of an offence punishable under Section 338. It was held that the

accused had acted rashly and negligently so as to endanger human life and the personal safety of others; and also that his act amounted to an offence under Section 337 (not 338) since there was no permanent privation of the sight of either eye in consequence of the operation.

Where a Hakim gives out that he is a skilled operator and charges considerable fees, the public are entitled to the ordinary precautions which surgical knowledge regards as imperative. To neglect such precautions entirely is negligence such as is contemplated by the criminal law.

(xii) *Emperor v. Ramava Channappa*, 17 Bom. L. R. 217 (1915).

(xiii) *Bhagava Giriyappa v. Empress*, 19 Bom. L. R. 54 = 38 Ind. Cas. 1003 (1917).

See these two rulings cited under heading "Death caused by poisoning" (page 88).

B. Allahabad.

(i) *Empress of India v. Idu Beg*, 3 A. 776 (1881).

Section 304 A is directed at offences outside the range of Sections 299 and 300 and contemplates those cases in which neither intention nor knowledge of the kind mentioned therein enters. For the rash or negligent act which is declared to be a crime is one "not amounting to culpable homicide" and it must therefore be taken that intentionally or knowingly inflicted violence, directly or wilfully caused, is excluded. It is impossible to hold that cases of direct violence, wilfully inflicted, can be regarded as either rash or negligent acts. There may be in the act an absence of intention to kill, to cause bodily injury as is likely to cause death or of knowledge that death will be the most probable result or even of intention to cause grievous hurt or of knowledge that grievous hurt is likely to be caused. But the inference seems irresistible that hurt at the very best will be presumed to have been intended or to have been known to be likely to be caused. If such intention or knowledge is present, it is a misapplication of terms to say that the act itself, which is the real test of criminality, amounts to no more than rashness or negligence.

(ii) *Empress of India v. Randhir Singh*, 3 A. 597 (1881).

When the accused caused the death of another by throwing a piece of a brick at him which struck him in the region of the spleen, and ruptured it, the spleen being diseased, the offence was not the offence of causing death by a rash or negligent act but the offence of voluntarily causing grievous hurt.

(iii) *Empress v. Bhikham*, 103 A. W. N. 1881.

The accused who was watching his field one dark night hearing a noise in the field shouted, whereupon a thief ran out of it, whom he followed and struck with a stick. The thief fell down, and the accused caught him and took him to the zaildar's house. The thief became insensible and subsequently died from the effects of the blow which the accused had given. It was held that a conviction under Section 304 A was bad.

(iv) *Empress v. Wazirulzama Khan*, 156 A. W. N. 1881.

The prisoner had been in charge of a police station, the vicinity of which had been troubled by thieves. On one occasion a thief had fired at the prisoner. It having been reported that three thieves were prowling about, he with other men went out

to patrol. They saw a man crouching under a tree, and thinking he must be a thief, the prisoner fired at him and killed him. The man proved to be a *halkira*. The prisoner wrote a false report to the effect that the deceased had been killed by thieves. It was held that under the circumstances the accused was guilty of an offence under Section 304 A.

(v) Queen-Empress *v.* Nand Kishore, 6 A. 248 (1884).

A, a servant of a railway company charged with moving some trucks by coolies on an incline, discharged this duty negligently and in consequence lost control of the trucks. Under his orders one of the coolies attempted to stop the trucks and was killed in the attempt. It was held that A had caused the death of the cooly by his negligence within the meaning of Section 304 A.

"The contention that the cooly's death was caused rather by his own act in attempting to stop the trucks or by the accident in slipping in the attempt, than by the negligence of the petitioner in sending the trucks along the line without sufficient precaution, has no force. Had the deceased in part contributed to his own death by his negligence, the circumstance would not exonerate the petitioner from the consequences of his own act—See Russell on Crimes, 4th edition, vol. 1, pages 870, 871, Reg. *v.* Longbottom, and Reg. *v.* Swindall and also Reg. *v.* Williamson, page 879, wherein a boat overloaded with passengers upset ; if the passengers had remained seated the accident would not have happened ; Williams, J. held that if the motion of the passengers jumping up really caused the accident, the overloading of the boat was immediately productive of such a result and thus the prisoner is answerable, if he should have contemplated the danger of such a thing happening."

(vi) Queen-Empress *v.* Bhutan, 16 A. 472 (1894).

The lessee of a Government ferry having the exclusive right of conveying passengers across a certain river at a particular spot allowed an unsound boat to be used at the ferry. In consequence of its unsoundness the boat sank while crossing the river and some of the persons in it were drowned. It was held that the lessee of the ferry was properly convicted under Section 304 A.

(vii) Emperor *v.* Abdus Satar, 28 A. 464 (1906).

The causing of hurt by negligence in the use of a gun would fall within the purview of Section 337 rather than o

Section 286. But when all the evidence was that the accused went out shooting in the month of July when people were likely to be about in the fields, and that a single pellet from his gun struck a man who was sitting in a field, it was held that this was not sufficient evidence of rashness or negligence to support a conviction under Section 337.

(viii) *Suraj Bali v. Emperor*, 5 A. L. J. 155=91 A. W. N. 1908=7 Cr. L. J. 306.

When the accused in good faith performed an operation upon a woman, with her consent, for cataract, according to the recognised method of Indian eye surgery, the result of which was that she lost her eyesight, it was held that he was not guilty of an offence under Section 338.

(ix) *Emperor v. Jamna*, 31 A. 290 (1909).

See this ruling cited under heading "Death caused by poisoning" (page 90).

(x) *Tapti Prasad v. Emperor*, 15 A. L. J. 590=18 Cr. L. 825=41 Ind. Cas. 335 (1917).

An Assistant Station Master gave a "line clear" to an incoming passenger train on a foggy night with the knowledge that a goods train was standing at a particular point where the passenger train might collide with it, but hoping to remove the goods train to a siding before the arrival of the passenger train. The goods train was not removed, and a collision occurred.

It was held that the Assistant Station Master was punishable under Section 304 A.

C. Calcutta.

(i) Empress *v.* Katabdi Mundul, 4 C. 764 (1879).

If a man intentionally commits an offence against the person, and consequences beyond his immediate purpose result, it is for the Court to determine how far he can be held to have the knowledge that he was likely by such act to cause the actual result. If such knowledge can be imputed the result is not to be attributed to mere rashness; if it cannot be imputed still the wilful offence does not take the character of rashness, because its consequences have been unfortunate. Acts probably or possibly involving danger to others may be offences under Sections 336 337, 338 or 304 A, if done without due care to guard against the dangerous consequences. Acts which are offences in themselves must be judged with regard to the knowledge or means of knowledge of the offender and placed in their appropriate place in the class of offences of the same character. There is a judgment of the Madras Court, Nidamarti Nagabhushanan (7 Mad. H. C. R. 119) in which Mr. Justice Holloway explains the meaning of the words rashness and negligence and this judgment has been recently approved by the Chief Court of the Punjab, and reproduced in a circular issued by it to all Courts.

(ii) Emperor *v.* Ganesh Dooley, 5 C. 351 (1879).

See this was cited under heading

"Death caused by snake bite" (page 106).

(iii) Surkaroo Kobiraj *v.* Emperor, 14 C. 566 (1887).

See this case cited under heading

"Death caused by operation" (page 105).

Section 304 A seems to apply to cases where there is no intention to cause death or no knowledge that the act done would in all probability cause death.

(iv) Queen-Empress *v.* Hurree Mohan Mythee, 18 C. 49 (1890).

See this case cited under heading

"Death caused by sexual intercourse" (page 107).

(v) *Gopinath Mahto v. Mansaram Koomar*, 5 C. W. N. 376 (1900).

A village headman having a license to conduct swinging during the *charukpujah* in his village was charged under Section 336 for allowing a person to swing by hooks inserted in the flesh instead of by being attached to the swinging apparatus by cloths. It was held that the headman was not guilty under Section 336.

(vi) *Shankar Balkrishna v. King-Emperor*, 32 C. 73 (1904).

The accused, an Assistant Station Master, wrote out in prescribed line clear book an incomplete certificate ; the guard took it in the absence of the accused, and without reading it, appended his signature and gave it to the driver ; there was a collision.

It was held that the act of the accused did not in itself endanger the safety of other persons, and the effect was too remote to be attributable to such a cause.

As is observed by the learned Judge of the Punjab Chief Court in the case of *Sant Das v. Emperor* (1894 Indian Railway Cases, 722) :—

" It appears to us to have been and to have properly been the intention of the legislature to make only those acts or omissions offences which themselves lead to certain serious results and to leave all subsidiary acts or omissions to be dealt with departmentally ."

(vii) *Emperor v. Morgan*, 36 C. 302 (1909).

(See introductory remarks.)

Two soldiers, firing at a target set up on the sky line on a hill with a rifle sighted up to 100 yards at least, killed a man passing on the road below ; they were held guilty under Section 304 A.

(viii) *Pika Bewa v. Emperor*, 39 C. 855 (1912).

See this case cited under heading

" Death caused by poisoning " (page 93).

The general remarks made in *Emperor v. Ketabdi Mundul*, 4 C. 764, are repeated.

(ix) *Narsingh Charan Mahapatra v. King-Emperor*, 18 C. W. N. 1176 = 27 Ind. Cas. 195 = 16 Cr. L. J. 131 (1915).

The petitioner was the lessee of a certain temple from some of the Shebaits and was the general manager of all of them. On

a certain day in the year pilgrims and others in large number visited this temple. Close by the gate leading from an outer courtyard into the inner temple there was a well which was surrounded by a masonry platform 1½ to 2 feet high and the ring or parapet of the well stood about 1 foot above the platform. Early at night on the day of the congregation of the pilgrims an accident having occurred, the petitioner at the instance of the Police Officer-in-charge had a light placed on or near the one foot parapet, but at a later hour the petitioner had the light removed, and thereafter between 1 and 2 A.M. while the people were again entering into the inner temple a boy, who had no previous knowledge of the well and in the darkness could not see it, fell into it. It was held that on the occasion of the festival in question, the temple became a place of public resort and it was the bounden duty of the petitioner as the person in-charge to take all reasonable precautions necessary to ensure the safety of those crowding thither by his license and invitation and the facts constituted an offence within the meaning of Section 336.

D. Madras.

(i) High Court Proceedings, 17th August 1871, No. 1423.

1 Weir 322 = 6 M. H. C. Rep. 31.

While the accused was being driven in a carriage to her house through the streets of a town at night at an ordinary pace in the middle of the road, the carriage came into contact with the complainant's father, an old deaf man, who was knocked down, run over and killed. It was found that when the accident took place the night was dark and the carriage without lamps but that the horsekeeper and coachman were shouting out to warn foot passengers. It was held that there was no evidence that the death of the deceased was caused by any negligence or rash act of the accused. The absence of the candles was due to a violation of a distinct order of the accused; and the fact that she directed careful driving when she discovered their absence rebuts any possibility of inferring that rash driving was due to her direction even if it existed as it did not. In India, looking at the passive submissiveness of the native servant, it would be a dangerous doctrine to hold that the master inside a carriage is entirely guiltless if his directions brought about the rash and negligent driving. When the death of the deceased is shown to have been caused by the negligence of the prisoner, it is not a complete defence to say that the deceased was also guilty of negligence, and so contributed to his own death. The conduct of the deceased will of course have an important influence, as a matter of fact, upon the relation of cause and effect between the act of the accused and the consequence induced.

(ii) *In re Nidamarti Nagabhushanan.*

1 Weir 324 = 7 M. H. C. 119 (1872).

See introductory remarks.

Add.—It is manifest that personal injury, consciously or intentionally caused, cannot fall within either of these categories which are wholly inapplicable to the case of an act or series of acts, themselves intended, which are the direct producers of death. To say that, because in the opinion of the operator the sufferers could have borne a little more without death following, the act amounts merely to rashness because he has carried the experiment too far, results from an obvious and dangerous misconception.

(iii) *Reg. v. Acharjys*, 1 M. 224 (1877).

In the course of a trivial dispute the accused gave the deceased a severe push in the back which caused him to fall to the road below, a distance of $2\frac{1}{2}$ cubits. In falling the deceased sustained an injury from which tetanus resulted, which caused his death on the 5th day afterwards. It was held that the accused was not guilty under Section 304 A.

(iv) *In re Intro Souza*, 1 Weir 327 (1886).

The accused, a cart-driver, absorbed in looking at certain preparations for a festival being made on grounds adjoining the road, on the south side thereof, drove the carriage on that side and ran over and killed a child. There was evidence to show that the child, which was killed, as well as other children crossed or attempted to cross in front of the cart, on finding the cart drawing close to them, and that though the road was broad, the accused drove his cart on the south side thereof and near to the edge regardless of those standing on that part of the road. It was held that the accused was rightly convicted under Section 304 A.

If a child's death was due to his having attempted to cross the road in front of a cart, when to make such attempt was itself dangerous, and no necessity to run such risk existed, and if it did exist, was not due to any act or omission on the part of the cart-driver amounting to criminal negligence, then the mere fact that, by the exercise of greater promptitude or mere caution, the cart might have been stopped in time would not be sufficient to support a conviction; it is for the prosecution to prove negligence, and to show that the acts and omissions of the accused contributed to the result.

(v) *In re George Loveday*, 1 Weir 337 (1887).

Where an engine-driver was taking an engine which was letting off steam along a public thoroughfare at a time when the traffic was exceptionally heavy, and within a few yards of a large number of horses and carriages which had been packed together, in spite of the warnings from the police that to do so would endanger the public safety, it was held that, although he might have believed that no danger would in fact be caused, the driver was none the less answerable for his act under Section 336.

(vi) Queen-Empress *v.* Damodaran, 12 M. 56 (1888).

When death is caused by an act being in its nature criminal, Section 304 A has no application.

The accused in this case struck the deceased several blows on the nape of the neck and the spine was fractured.

(vii) *In re Thippana Gangi Reddi*, 1 Weir 337 (1890).

The only question in a case under Section 336 are (1) whether the act done is a rash and negligent one and (2) whether it was such as was likely to endanger life. No distinction can be drawn between the act itself and the instruments with which it is done.

(viii) P. Chandu *v.* Emperor, 13 Cr. L. J. 703 = 16 Ind. Cas. 511 (1912).

Accused, who owned a paddy field in a jungly tract, discharged a gun in the direction of a footpath close to his field through which the complainant was passing. The complainant was wounded in the leg and had to be treated in the hospital and his leg amputated. The accused knew that the footpath was generally used by the public. It was held that the accused was guilty of culpable negligence and was rightly convicted under Section 338.

E. Punjab.

(i) *Empress v. Ganda Singh*, 11 P. R. 1880.

When death resulted from violence intentionally directed against the deceased by the accused, the conviction should be under Section 323 and not under 304 A.

(ii) *Empress v. Saifulla*, 15 P. R. 1882.

Section 304 A is not applicable to a case where death is caused by an act which is itself an offence as the act cannot be said to have been done rashly or negligently.

(iii) *Fatteh v. Empress*, 34 P. R. 1887.

In cases in which death is caused by a slight degree of violence without the knowledge that the act is likely to cause death, and which proves fatal only by reason of some disease or infirmity unknown to the person who uses criminal force, the circumstance that death has been the result of unlawful violence being eliminated, the question is what offence not amounting to culpable homicide has been committed, and this depends chiefly upon the degree of violence used and the knowledge of the actor as to the probable result of such violence.

Section 304 A is inapplicable to cases of death caused by direct violence intended to cause bodily injury, and the first sections to consider are those defining voluntarily causing of hurt.

(iv) *Mustt. Bakhan v. Empress*, 60 P. R. 1887.

See this case cited under heading

"Death caused by poisoning" (page 96).

(v) *Empress v. Hayat*, 11 P. R. 1888.

The accused entertained a belief that a stooping child whom he caught sight of in the early gloaming was a spirit or demon, the child being in a place which the villagers deemed to be haunted. The Sessions Judge convicted under Section 304 A, and the Chief Court declined to interfere on revision; and it was noted that the conviction could be upheld on the ground that, though the prisoner was under a mistake of fact, he did not in good faith, that is with due care and attention, believe himself to be justified in doing the act.

(vi) Jama v. Empress, 28 P. R. 1888.

An ordinary fight having taken place between the complainant and the father of the accused, the accused, seeing his father getting the worst of it, went to his assistance armed with a *parani*, a stick for driving bullocks, with which he struck a single blow at the complainant, who had entered into the fight with a child of two years old on his hip. The blow missed the complainant and fell on the head of the child who died from the blow within an hour. It did not appear that the blow, if it had hit the complainant as intended, would have been likely to cause more than a simple hurt. It was held that, although the offence intended was not serious, the fact that the complainant had the child on his hip was a fact of which the accused was bound to take notice and cause to act as a restraint on his actions; that to continue to act as if no child was there and to aim blows which would be likely to hit the child and would probably be fatal or very serious, if they did hit it, was to act in a rash or negligent manner; and as the accused by thus acting caused the death of the child, the offence falls under Section 304 A.

(To bring the case under Section 304, it would be necessary to show that the blow intended for Kalu was at least one which the accused knew to be likely to cause death not to the child, or to anyone it might hit, but to Kalu himself (Section 301).

(See similar cases cited under Chapter II, Class 1, under General Remarks, page 55.)

(vii) Chunni Lal v. Empress, 33 P. R. 1889.

The accused and deceased were standing on the parapet of a deep well. An altercation having arisen between them the accused struck the deceased on the head with a *lathi*. The deceased lost his balance, fell into the well and was drowned. It was held that the accused did not cause death while doing an act with the knowledge that he was likely by such act to cause death, but that he was guilty of a rash and negligent act which caused death and should therefore be convicted under Section 304 A.

P. 128. "We are well aware of the numerous cases which decide that this section does not apply to cases when death is caused by wilful or direct violence executed against the person killed; and we do not intend to touch upon the

authority of those cases in any respect. Here the accused used but a slight degree of violence which caused but slight injury, and would not have resulted in fatal consequences but for the circumstances that the deceased was on the edge of a very deep well and, as it happened, fell without any design on the part of the accused into the well and was drowned...

.....To strike the deceased while on the edge of the well was a rash act, and it caused the death of the deceased, though not so as to amount to culpable homicide. The case is distinguishable from all those cases in which death is the result of a consequence unforeseen, and not capable of being foreseen, as when the man struck has a diseased spleen of which the striker has no knowledge, or when the deceased fell and broke his toe and died of tetanus. Here the danger was visible; the accused with his eyes open to risk took the chance when he struck the deceased of his falling into the well. It was the circumstance of incurring a patent risk which brings him within the section, and distinguishes the present case from those cited."

(viii) *Charles Myrick v. Emperor*, 111 P. L. R. 1902.

When the deceased without any authority tried to take from the accused a loaded gun in his possession and in the course of the struggle the deceased was accidentally shot and killed, it was held that the accused was not guilty of any offence.

(ix) *Kamruddin v. Emperor*, 22 P. R. 1905.

The prisoner sent two boxes for carriage upon a railway containing fireworks, falsely declaring them to contain iron locks, with the result that, in loading, one of the boxes exploded killing one coolly and injuring another and damaging the railway wagon in which it was being placed. It was held that as the act of the prisoner was directly connected with the consequences that ensued, he was liable for the results of the accident, and was guilty of offences under Sections 304 A and 338.

The scientific definition of culpable rashness and culpable negligence given by Mr. Justice Holloway in *Reg. v. Nidamarti Nagabhushaman* (7 M. H. C. R. 119) which has been generally accepted ever since, leaves nothing for me to say on this head.

6 A. 248 (*Queen-Empress v. Nand Kishore*) and *Reg. v. Crowe* (3 C and K 123) are cases very much in point to bring

home the guilt of causing death to the accused. See also Queen-Empress *v.* Bhutan (16 A. 472) and Queen *v.* Williamson (1 Cox Cr. Case 97).

It is a rule of criminal law that in cases of this kind it is no defence that the deceased was guilty of contributory negligence. III Russel (6th edition) 201; Regina *v.* Kew (12 Cox Cr. Cases 355); Regina *v.* Longbottom (3 Cox Cr. Case 439).

(x) Gujjar *v.* Crown, 12 P. R. 1911.

Section 304 A would not apply to a case where a man in order to evade arrest, strikes out wildly with a dangerous weapon and causes the death of a person.

(See this case cited in Chapter II, Class 1.)

F. Burma.

(i) Queen-Empress *v.* Lu Maung, L. B. R. 1872-1892, 89.

Section 304 A is intended to provide for cases where death is caused by rashness and negligence in doing the act, and when the person doing the act is culpable in so far as it relates to the causing of death only by reason of his rashness and negligence.

When a person deliberately throws a stone at another with the intention of killing him, and causing him hurt, the act is an offence of itself, and the accused is liable to be punished for causing the death of the deceased, and should be committed for trial on a charge of culpable homicide.

(ii) Queen-Empress *v.* Nga Tha Ku, L. B. R. 1872-1892, 91.

The provisions of Section 336 are intended to meet cases where acts which are themselves lawful are done so rashly and negligently as to endanger human life or the personal safety of others. To throw stones on the top of a house at a wedding is not to do an act rashly or negligently. The act may have been in itself a dangerous one, but the person committing the act may very well have thrown the stones with great care and skill and without any rashness or negligence. In order to convict a person under the above section, the person must prove rashness or negligence on the part of the accused, and also that, by such rashness or negligence, human life or the personal safety of others was endangered. (See No. (vi))

(iii) Queen-Empress *v.* Nga Pan Gyi, L. B. R. 1872-1892, 308.

The deceased and the accused went out shooting together in the jungle and in course of time got separated. Ultimately the accused saw something move in the jungle, and without stopping to see whether it was a man or beast that caused the movement, that is to say, without seeing what he fired at, fired and killed the deceased. It was held that if this is not culpable rashness it is certainly culpable negligence, and that the accused was guilty of an offence under Section 304 A.

(Note.—This case differs from King-Emperor *v.* Timmappa, 3 Bombay L. R. 678, as in that case the accused, hearing a rustle, fired in that direction, but the shot reached his companion and caused his

death. It was held that the affair was a pure accident and the accused was protected by Section 80. The accused did not apparently fire directly at the deceased).

(iv). Queen-Empress v. Nga Tun, L. B. R. 1872-1892, 595.

Section 336 is not appropriate for the punishment of a person deliberately throwing stones at a house. The offence falls under Section 504

(v). Nga Shwe In v. Queen-Empress, L. B. R. 1893-1900, 221.

Accused left his house at 2 a.m. to fetch medicine for his wife.

Having to pass a spot reputed and believed by him to be haunted, he took a small *dhamma* with him. When he was near the spot a woman, who was a stranger to him, suddenly approached him in the darkness. She appeared to him to approach with arms extended as if to seize him, and believing that she was some demon or devil struck out at her and then ran away.

The conviction [under Section 304 A was upheld.

(vi) Queen-Empress v. Nga Myat Thin, L. B. R. 1893-1900, 426.

A rash act is primarily an overhasty act and is thus opposed to a deliberate act, but it also includes an act which, though it may be said to be deliberate, is yet done without due deliberation and caution. When a person intentionally throws a stone at a house or on a house under such circumstances that, although he does not intend to cause hurt, and does not in fact cause hurt, he must yet know that he is likely to cause hurt, he commits an offence punishable under Section 336.

(Queen-Empress v. Nga Tun, L. B. R. 1872-1892, 595, and Queen-Empress v. Nga Tha Ku, 1872-1892, 91, were dissented from; 14 C. 566 was applied).

(vii) Queen-Empress v. Nga Ni, U. B. R. 1897-1901, Vol. 1, 314.

Section 304 A does not apply to a case in which the act itself was unlawful and amounted to the voluntary commission of an offence against the person. Personal injury intentionally

caused is neither a rash nor a negligent act. When an act of violence which is itself an offence has been committed the nature of the offence depends on the knowledge of the offender.

(viii) *Nga Po Kyaw v. King-Emperor*, 1 U. B. R., 1902-03, Penal Code 1.

The accused acting *bona fide*, gave a severe beating, according to the generally followed method, to a young woman believed by herself and her relatives to be possessed, for the purpose of casting out an evil spirit, but she died as the beating was done without due care and attention. It was held that, as there was neither the intention nor the knowledge that death would be the result, the accused committed an offence under Section 304 A.

(See similar cases *Queen-Empress v. Jamaldin*, Rat. Un. Cr. C. 603 and *Queen-Empress v. Dhondi*, Rat. Un. Cr. C. 785 and *Naga Po Tha v. Emperor*, 3 U. B. R. (1917) 54, cited in Chapter II. This case was distinguished in the case last cited on the ground that the woman herself voluntarily submitted to the treatment ; and that she had been suffering from hysteria for years, and among her own people she was universally believed to be under the direction of an evil spirit ; whereas in the later case the woman protested and there was no evidence to show that she was suffering from anything but an ulcer on the leg.)

(ix) *Queen-Empress v. Bashin*, 1 L. B. R. 45 (1900).

For the conviction of an offence under Section 336 the fact that human life or the personal safety of others was endangered must be proved. It is not merely a question of the words "rashly or negligently".

(x) *King-Emperor v. Nga Shwe Lu*, U. B. R. 1904, 1st Qr. Penal Code 6 = 1 Cr. L. J. 557.

Section 337 applies only to acts done without any criminal intent. Personal injury intentionally caused is neither a rash nor a negligent act.

(xi) *King-Emperor v. Nga Po Aung*, U. B. R. 1905, Penal Code 15 = 2 Cr. L. J. 475.

An act which is itself unlawful is neither rash nor negligent.

(xii) Emperor v. Po Taw, 3 L. B. R. 194 = 4 Cr. L. J. 201.

An act such as throwing a bottle into a house, done with the intention of hurting or frightening the inmates, constitutes an offence under Section 351 and not under Section 336.

(xiii) Ma Nyein Gale v. Nga Sein, 5 L. B. R. 100=4 Ind. Cas. 293 = 10 Cr. L. J. 552 (1909).

When the accused threw brickbats at the back of the complainant's house and there was no evidence to show that human life or personal safety of any body was endangered by the accused's acts, it was held that the accused ought not to be convicted under Section 336 but under Section 426.

G. Other Rulings.

(i) *Emperor v. Mardan Singh*, 14 C. P. L. R. Cr. 126.

Section 304 A does not apply to a case in which there has been the voluntary commission of an offence against the person. The nature of the offence committed by the accused should be determined on a consideration of the intention and knowledge of the accused and the probable consequence of his act.

(ii) *Queen v. Mussammat Pamkoer*, 5 N. W. P. 38.

When a mother overfed her child, it was held that she was not guilty of an offence under Section 304 A.

(iii) *Raghu v. Emperor*, 26 Ind. Cas. 664 = 16 Cr. L. J. 72 (Oudh).

A ferry boat was overloaded and a strong wind was blowing and the water was rough. The boat broke loose and the people got into a state of panic. One boat fell and sank, and another boat, to which the boat was attached, overturned. Two men were drowned. It was held that the lessees could not be convicted under Section 304 A. as it was not proved that the boat or boats which were used at the particular time were in an unseaworthy condition; on the other hand it was found that had it not been for the high wind either of the boats would have made the passage without mishap.

GENERAL REMARKS.

All the Courts are agreed that these sections cannot apply to cases where injury has been caused intentionally or by an act which is itself unlawful.

The Punjab Chief Court in *Chunni Lal v. Emperor* (33 P. R. 1889) applied Section 304 A. to a case of a man striking another on the head with a *lathi* on the edge of the well so that the man fell into the well and was killed. Such a case differs from *Reg. v. Acharjys*, 1 M. 224, wherein the accused pushed the deceased so that he fell down a few feet and sustained an injury from which tetanus resulted. In that case the death was a purely accidental result and could not possibly have been foreseen. But in the Punjab case it was held that the accused must have known the risk incurred in hitting a man standing on the edge of a well, and it was the circumstance of incurring a patent risk which brought him within Section 304 A.

The case is also distinguishable from those cases where death is the result of a diseased spleen. In *Emperor v. Safat-ulla*, 4 C. 815, it was held that to find a person who had caused the death of another with an enlarged spleen by blows inflicted on the body guilty under Section 304 A, it would not do for the jury to infer rashness from the mere fact of the prevalence of the disease of the spleen in the district; but they must be satisfied of the accused's knowledge of such prevalence and of the danger to life involved in the striking on the trunk of the body of a person who might be effected with the disease. This case is referred to in Nelson and Shephard's Indian Penal Code (sixth edition), page 666:—"This decision is not sound and cannot be supported. Such a knowledge would bring the case within Section 299. Moreover Section 304 A has no application when the act in question is itself an offence against the person."

It seems doubtful whether *Nga Po Kyaw v. King-Emperor*, 1 U. B. R. 1902-1903, 1, can be reconciled with the general principle that Section 304 A. does not apply to cases where injuries have been intentionally caused. In that case the accused gave a severe beating to a young girl for the purpose of driving out an evil spirit. In two similar cases, *Queen-Empress v. Jamal-udin* (Rat. Un Cr. C. 603) and *Queen-Empress v. Dhondi* (Rat. Un. C. Cr. C. 785) the Bombay High Court held in the first that an offence under Section 304 was committed, and in

the second that the accused was guilty of no offence as what he did was done in ignorance and good faith ; and in Nga Po Tha's case, 3 U. B. R. (1917) 54, the conviction was under Section 304, part 2.

Rash driving or driving negligently on the wrong side of the road or leaving a cart to go unattended along the road gives rise to an offence under these sections (see Queen-Empress v. Bali, Rat. Un. Cr. C. 396 ; Government of Bombay v. Malkaji, Rat. Un. Cr. C. 198 ; George Loveday, 1 Weir 337 ; Intro Souza, 1 Weir 327) but where a carriage is proceeding at an ordinary pace along the streets, and the coachman is shouting out to warn passengers and a deaf old man is knocked down and killed, even though the night was dark and the carriage had no lights, there is no offence (1 Weir 322).

A ferryman may be guilty of an offence under Section 304 A if drowning results from the unsoundness of a boat or from overcrowding (Queen-Empress v. Bhutan, 16 A. 472 ; Reg. v. Williams cited in 6 A. 248).

In Raghu v. Emperor, 16 Cr. I. J. 72 = 26 Ind. Cas. 664, where owing to strong wind and rough water a ferry boat overturned and sank, it was held that the lessee of the ferry could not be convicted under Section 304 A unless it is shown that the boat although overcrowded was in an unseaworthy condition at the time of the occurrence.

Shooting fatalities may come under these sections. See Emperor v. Wazirulzama Khan, 156 A. W. N. 1881,

Emperor v. Morgan, 36 C. 302.

P. Chandu v. Emperor, 13 Cr. L. J. 703 (Madras).

Queen-Empress v. Nga Pan Gyi, L. B. R. 1872-1892, 308.

But if the death or injury is purely accidental, as in King-Emperor v. Timmappa, 3 Bombay L. R. 678, and Emperor v. Abdul Star, 28 A. 464 there is no offence.

Cases of death or illness or injury caused by poisoning, operations, snake bites and sexual intercourse have been dealt with under those headings in Chapter II.

In Empress v. Hayat, 11 P. R. 1888, and Nga Shwe In v. Queen-Empress, L. B. R. 1893-1900, 221, Section 304 A was applied to cases where a man had caused death to a human being, believing the person to be a spirit or demon. In the Burma case it was written :—“ Whilst the Criminal Law does not

take cognizance of the existence of apparitions or demons, so that it would be difficult to say what mistake of fact would give ground to any person for believing himself justified by law in using a deadly weapon against any apparition or demon, it is to be observed that the mistake in this case could not have occurred if the appellant had used ordinary care and caution before he inferred that the creature he saw was not a human being." Similar reasoning was employed in the Punjab ruling.

On similar facts, the Allahabad High Court in Queen-Empress *v.* Kangla, 163 A. W. N. 1898, convicted for culpable homicide not amounting to murder.

The following are cases of stone or bottle throwing :—
3 A. 597 ; Burma rulings Nos. (ii), (iv), (vi), (xii) and (xiii).

Contributory negligence on the part of the deceased is not a complete defence.

(Queen-Empress *v.* Nand Kishore, 6 A. 248, and English rulings cited therein ; 1 Weir 322, 22 P. R. 1905.)

CHAPTER V.

SIMPLE AND GRIEVOUS HURT.

319. Whoever causes bodily pain, disease, or infirmity to any person is said to cause hurt.

320. The following kinds of hurt only are designated as grievous :—

1st.—Emasculation.

2nd.—Permanent privation of the sight of either eye.

3rd.—Permanent privation of the hearing of either ear.

4th.—Privation of any member or joint.

5th.—Destruction or permanent impairing of the powers of any member or joint.

6th.—Permanent disfigurement of the head or face.

7th.—Fracture or dislocation of a bone or tooth.

8th.—Any hurt which endangers life, or which causes the sufferer to be, during the space of twenty days, in severe bodily pain or unable to follow his ordinary pursuits.

321. Whoever does any act with the intention of thereby causing hurt to any person or with the knowledge that he is likely thereby to cause hurt to any person, and does thereby cause hurt to any person, is said "voluntarily to cause hurt."

322. Whoever voluntarily causes hurt, if the hurt which he intends to cause or knows himself to be likely to cause is grievous hurt, and if the hurt which he causes is grievous hurt, is said "voluntarily to cause grievous hurt."

Explanation.—A person is not said voluntarily to cause grievous hurt except when he both causes grievous hurt and intends, or knows himself to be likely to cause grievous hurt. But he is said voluntarily to cause grievous hurt if intending or knowing himself to be likely to cause grievous hurt of one kind he actually causes grievous hurt of another kind.

ILLUSTRATION.

A, intending or knowing himself to be likely permanently to disfigure Z's face gives Z a blow which does not permanently disfigure Z's face, but which causes Z to suffer severe bodily pain for the space of twenty days. A has voluntarily caused grievous hurt.

323. Whoever, except in the case provided for by Section 334, voluntarily causes hurt, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.

324. Whoever, except in the case provided for by Section 334, voluntarily causes hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance, or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with imprisonment of either description for a term which may extend to three years or with fine or with both.

325. Whoever, except in the case provided for by Section 335, voluntarily causes grievous hurt, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

326. Whoever except in the case provided for by Section 335, voluntarily causes grievous hurt by means of any instrument for shooting.....(as in Section 324).....shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.

327. Whoever, voluntarily causes hurt for the purpose of extorting from the sufferer, or from any person interested in the sufferer, any property or valuable security, or of constraining the sufferer or any person interested in such sufferer to do anything which is illegal, or which may facilitate the commission of an offence, shall be punished with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.

328. Whoever administers to, or causes to be taken by, any person any poison or any stupefying, intoxicating, or unwholesome drug or other thing, with intent to cause hurt to such person, or with intent to commit or facilitate the commission of any offence, or knowing it to be likely that he will thereby cause hurt, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

329. Whoever voluntarily causes grievous hurt for the purpose of extorting from the sufferer.....(as in Section 327.....) shall be punished with transportation for life or imprisonment of either description which may extend to ten years and shall also be liable to fine.

330. Whoever voluntarily causes hurt for the purpose of extorting from the sufferer, or from any person interested in the sufferer, any confession or any information which may lead to the detection of an offence, or misconduct, or for the purpose of constraining the sufferer, or any person interested in the sufferer, to restore or to cause the restoration of any property or valuable security, or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine.

ILLUSTRATIONS.

(a) A, a Police officer, tortures B in order to induce Z to confess that he had committed a crime. A is guilty of an offence under this Section.

(b) A, a Police officer, tortures B to induce him to point out where certain stolen property is deposited. A is guilty of an offence under this section.

(c) A, a Revenue officer, tortures B to compel him to pay certain arrears of revenue due from Z. A is guilty of an offence under this section.

(d) A, a zemindar, tortures a ryot to compel him to pay his rent. A is guilty of an offence, under this section.

331. Whoever voluntarily causes grievous hurt for the purpose of extorting from the sufferer, etc.....as in Section 330.....shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

332. Whoever voluntarily causes hurt to any person being a public servant, in the discharge of his duty as such public servant, or with intent to prevent or deter that person or any other public servant from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by that person in the lawful discharge

of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

333. Whoever voluntarily causes grievous hurt to any person being a public servant.....as in Section 332.....shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

334. Whoever voluntarily causes hurt on grave and sudden provocation, if he neither intends nor knows himself to be likely to cause hurt to any person other than the person who gave the provocation, shall be punished with imprisonment of either description for a term which may extend to one month or with fine which may extend to five hundred rupees or with both.

335. Whoever voluntarily causes grievous hurt on grave and sudden provocation, if he neither intends nor knows himself to be likely to cause grievous hurt to any person other than the person who gave the provocation, shall be punished with imprisonment of either description for a term which may extend to four years, or with fine which may extend to two thousand rupees or with both.

Explanation.—The last two sections are subject to the same proviso as exception 1, Section 300.

Sections 321, 322, 323.

The term voluntarily is defined in Section 39 :—A person is said to cause an effect "voluntarily" when he causes it by means whereby he intended to cause it, or by means which at the time of employing those means, he knew, or had reason to believe, to be likely to cause it.

Complaints under Section 323 are very common, and in many cases the alleged hurt is so trivial that the complaint can be dismissed under the provisions of Section 95 which enacts that nothing is an offence by reason that it causes, or that it is intended to cause, or that it is known to be likely to cause, any harm, if that harm is so slight that no person of ordinary sense and temper would complain of such harm.

When there are no marks of injury at all, Section 95 can usually be applied ; at least the burden of proof would be on the complainant to show by medical evidence or otherwise that, though there are no external marks of injury, internal

hurt and pain has been caused. In Government of Bengal v. Sheo Gholam Lalla, 24 W. R. Cr. 67, it was held that the pain caused by a blow across the chest with an umbrella was not of such a trivial character as to come within the meaning of Section 95 but was hurt under Section 319. The accused was a dismissed policeman, and the person struck was his Superintendent.

Sections 320 and 325.

Before a person can be convicted of causing grievous hurt under Section 325 it must be proved that hurt described in Section 320 as grievous hurt has been caused. The letter of a Medical Officer expressing an opinion is not evidence under Sections 368 and 370, Cr. P. Code.

(Queen v. Kaminee Dossee, 12 W. R. Cr. 25).

To make out the offence of causing grievous hurt under Section 325 there must be some specific hurt, voluntarily inflicted, and coming within some of the eight kinds enumerated in Section 320.

(Queen v. Budri Roy, 23 W. R. Cr. 65).

And where the conviction is for causing grievous hurt, the record must show under which of the categories of "grievous hurt" specified in Section 320 the offence falls (1 W. R. Cr. Letters, 5).

It is for the Magistrate to classify and to come to a finding of his own as to whether the hurt was grievous or simple and for this purpose, the Magistrate should examine the Medical Officer to ascertain whether the injuries are of any of the kinds specified in Section 320. It is not the business of the Medical Officer to decide whether a wound is grievous hurt or not, but to describe the facts, from which the Magistrate will decide (Po Maung v. Emperor, 3 L. B. R. 196 = 4 Cr. L. J. 202, 1906). If in case of grievous hurt the Medical evidence is not taken the accused will always be entitled to the benefit of the presumption which would arise from the prosecution withholding the best evidence (Queen-Empress v. Nga Chet, L. B. R. 1872—1892, 292).

A disability for 20 days constitutes grievous hurt (Queen v. Bishnooram Surma, 1 W. R. Cr. 9), but in order that hurt may be grievous hurt under Section 320, cl. (8), it is necessary that it should endanger life, or cause the sufferer to be for 20 days in severe bodily pain or unable to follow his ordinary pursuits. The mere fact that an injured person is

under medical treatment for twenty days does not necessarily show that he has suffered grievous hurt (Crown v. Ya Baw, 1 L. B. R. 221, 1902).

The eighth class is no exception to the general rule that a penal statute must be construed strictly. The mere fact that an injured person remained in hospital for the space of twenty days is not sufficient proof of the offence of grievous hurt. From that circumstance the inference could not be drawn that the injured person was during that period unable to follow his ordinary pursuits. An injured man may be quite capable of following his ordinary pursuits long before the twenty days are over, and yet for the sake of permanent recovery, or greater ease and comfort, be willing to remain as a convalescent in a hospital especially if he is fed at the public expense.

(Queen-Empress v. Vasta Chela, 19 B. 247 ; 1894)

If a person is confined to hospital for less than 20 days, but his life is in danger during that period, the injuries amount to grievous hurt.

(Queen v. Bassoo Rannah, 2 W. R. Cr. 29).

Where a person is so injured that he has to go to hospital from which he is discharged on the 20th day, this day counts as one of the twenty days.

(R. v. Sheikh Bahadur, Madras Sessions, 1862).

An action under Section 323 is a personal one and comes to an end on the complainant's death; but a charge under Section 325 does not abate on the complainant's death, inasmuch as such an offence is not compoundable without the Court's express sanction.

(Rama Nand v. Crown, 26 P. R. 1917 ; Labhu and Bhagtu v. Crown, 25 P. R. 1919.)

A case under Section 325 cannot be compounded by the heirs of the person to whom the hurt is caused if that person is dead.

(Empress v. Rahmat, 37 A. 419 ; 1915).

Sections 324 and 326.

The expression "an instrument which used as a weapon of offence, is likely to cause death" in Section 324 should be

construed with reference to the nature of the instrument and not the manner of its use.

(Queen-Empress *v.* Nga Po Thit, U. B. R. 1897-1901, Vol. I, 311.)

The object of Section 324 is to make simple hurt more grave and liable to a more severe punishment, when it has the *differentia* of one of the modes of infliction described in the section. It is not necessary that the manner of use of the weapons must be such as is likely to cause death.

(High Court Proceedings, 5th November 1872 ; 1 Weir 535 = 7 M. H. C. App. II.)

A person cutting his wife's nose with a razor is guilty of an offence under Section 326 (Emperor *v.* Gangu, 19 P. R. 1902). Nose cutting is an offence for which leniency is ordinarily speaking out of place (Sikandar *v.* Crown, 20 P. R. 1915).

Section 328.

It is curious to note that to cause hurt voluntarily by means of any poison is punishable under Section 324 with three years imprisonment only, but to administer any poison with intent to cause hurt is punishable under Section 328 with ten years imprisonment.

To support a conviction under section 328 there must be an intent to cause hurt or to commit and facilitate an offence or a knowledge of likelihood of hurt ; therefore a woman who administers poison to her lover in sweetmeat balls given to eat in the belief that it was a charm that would revive his love for her and without any knowledge that the substance was a deadly poison could not be convicted under this section.

(Emperor *v.* Nagawa, 4 Bom. L. R. 425 ; 1902.)

Mere administration of the drug will not do. There must also be evidence to show that such administration was with the intent or knowledge specified in the section.

(Muruga Goundan *v.* Emperor, 15 Cr. L. J. 599 = 25 Ind Cas. 351 1914.)

When the accused called in a "medicine man" to detect a case of theft, and the latter told him that he would administer the juice of some leaves to all the villagers which would cause the

belly of the thief to swell, and the man mixed some drug with the juice in the presence of the accused ; and of those who submitted to the ordeal, three showed symptoms of having been poisoned and suffered severely for upwards of a fortnight ; it was held that the accused had committed an offence under Section 328 for having caused an unwholesome drug to be administered.

(*In re Dasi Pichigadu*, 1 Weir 335, 1883.)

In a case where the accused was proved to have put something, found subsequently to be poison by the Chemical Examiner, into the food prepared for the prosecutor's family, and there was no evidence as to the quantity of the poison found in the food or as to the probable effects on any one who might have eaten it, it was held that the accused must have intended to cause hurt at least and was guilty of offences under Sections 328 and 511.

(*Mi Pu v. King-Emperor*, 5 L. B. R. 79 = 3 Ind. Cas. 721 = 10 Cr. L. J. 363, 1909.)

See also the following cases cited under Chapter II, Class (iii) (page 88) :—Bombay (i) and (iii) ; Allahabad (ii) ; Punjab (v).

Sections 330 and 331.

To bring a case under Section 330 it must be proved that the hurt was caused with the intent to extort a confession of some offence or misconduct punishable under the Penal Code. The section does not apply to a case when the confession extorted had reference to a charge of witchcraft. (*Queen v. Baboo Koondu*, 13 W. R. Cr. 23.)

When a Police officer extorts a confession by means of hurt, the offence is of the gravest character, and such as to shake judicial confidence in a most important portion of the evidence, which has commonly to be relied on by courts of justice, namely, the genuineness and trustworthiness of early confessions, for such evidence ought to be free from the slightest taint and to tamper with it is to pollute justice at the fount.

(*Nga Po Mya v. Queen-Empress*, U. B. R. 1397-1901) Vol. 1, 320.)

When a Police constable in the course of an investigation, beat the deceased who died nine days after, it was held that he was guilty of an offence under Section 330.

(*Meah Mahomed v. Crown*, 86 P. R. 1866.)

Causing hurt for the purpose of extorting information which might lead to the detection of an offence is punishable under Section 330. It is immaterial whether the offence has been committed.

(Queen v. Nim Chand Mookerjee, 20 W. R. Cr. 41.)

When a village Magistrate was present at the beating and the wrongful confinement by a Police constable, of a person suspected of having committed theft, and it was proved that the village Magistrate actually encouraged the ill-treatment by the constable, it was held that though the village Magistrate may not have been bound to report the commission of the offences under Section 45 (c), Criminal Procedure Code, they being bailable offences, he was guilty of abetting the offences punishable under Sections 330 and 348, inasmuch as the offences were "cognizable" offences and as the village Magistrate was not a simple spectator, but also encouraged the Police constable in the commission of the offence (*In re Krishna Shetti, In re Gopala, 1 Weir 50, 1891*).

A person who lends a house to a Police officer for investigating a complaint of theft preferred by himself, with the knowledge that the house is to be used for torturing persons suspected of complicity in the offence, and who is also present at such torturing, can be convicted of abetment of an offence under Section 330.

(Empress v. Faiyaz Hussan, 194 A. W. N. 1896.)

A policeman, who stands by and acquiesces in an assault committed on a prisoner by another policeman for the purpose of extorting a confession, is guilty of abetting an offence under Section 330.

(Queen-Empress v. Latif Khan, 20 B., 394).

The word "demand" in Section 330 apparently refers to some demand in respect of property, therefore when the accused in order to constrain his wife to satisfy his demand that she should return to his house voluntarily caused hurt to her, he cannot be convicted under Section 330.

(Queen-Empress v. Ella Boyan, 11 M. 257, 1887.)

A person voluntarily causes hurt when he himself does an act with the intention of causing hurt or with the knowledge that he is likely thereby to cause hurt to any person, and actually

causes hurt thereby to any person. Hence a person, who, by using threats, forces another to dip his hands into hot oil, can be convicted of criminal intimidation only.

(Empress *v.* Hirde Ram, 9 C. P. L. R. Cr. 18.)

Sections 334 and 335.

In Banku Behari Ditta *v.* Emperor, 14 Cr. L. J. 442 = 20 Ind. Cas. 602, one Judge held that the accused understood the meaning of the abusive word employed by the complainant, which in itself constituted grave and sudden provocation ; the other Judge held that the accused did not understand the meaning of the word, and that the provocation was neither grave nor sudden.

Section 334 applies to the case of a person who causes hurt on grave and sudden provocation to the person giving the provocation (Reg. *v.* Bhala Chula, 1 B. H. C. 17).

In Queen *v.* Chullundee Poramanick, 3 W. R. Cr. 55, it was held that a man, who by a single blow with a deadly weapon, kills another man who, at dead of night, entered his room for the purpose of having criminal intercourse with his wife, is guilty only of causing grievous hurt on grave and sudden provocation.

When the particular act, such as nose-cutting, is one which imports deliberate design, the plea of grave and sudden provocation, or the excuse it implies, will not have the same effect as in the case of a man who in sudden and provoked anger strikes a blow, however serious that blow may be.

Sentence under Section 335 enhanced from four months to two years.

(Emperor *v.* Bhagwan Chhagan, 17 Bom. L. R. 68 = 16 Cr. L. J. 168 = 27 Ind. Cas. 552).

CHAPTER VI.

HURT CAUSED TO PUBLIC SERVANTS.

Sections 332 and 333.

These sections may be considered along with Section 353 which enacts that whoever assaults or uses criminal force to any person, being a public servant in the execution of his duty as such public servantand so on as in Sections 332 and 333... shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.

The definition of "criminal force" and "assault" are given in Sections 350 and 351:-

350. Whoever intentionally uses force to any person without that person's consent in order to the committing of any offence or intending by the use of such force to cause, or knowing it to be likely that by the use of such force he will cause, injury, fear, or annoyance to the person to whom the force is used, is said to "use criminal force" to that other.

351. Whoever makes any gesture, or any preparation, intending or knowing it to be likely that such gesture, or preparation, will cause any person present to apprehend that he who makes that gesture, or preparation, is about to use criminal force to that person, is said to commit an assault.

Explanation.—Mere words do not amount to an assault. But the words which a person uses may give to his gestures, or preparations, such a meaning as may make those gestures or preparations amount to an assault.

Public Servant.—The chief points of dispute that arise in these cases are whether the person assaulted or injured is a public servant, and whether he is acting in the discharge of his duty as such public servant.

The term public servant is defined in Section 21 as follows:—

The words "public servant" denote a person falling under any of the descriptions hereinafter following, namely:—

1st.—Every covenanted servant of the King;

2nd.—Every Commissioned Officer in the military or naval forces of the King while serving under the Government of India or any Government;

3rd.—Every Judge;

4th.—Every officer of a Court of Justice whose duty it is as such officer, to investigate or report on any matter of law or fact, or to make, authenticate, or keep any document, or to take charge or dispose of any property, or to execute any judicial process, or to administer any oath, or to interpret, or to preserve order in the Court, and every person specially authorized by a Court of Justice to perform any of such duties,

5th.—Every Juryman, Assessor, or Member of a Panchayat assisting a Court of Justice or public servant;

6th.—Every arbitrator or other person to whom any cause or matter has been referred for decision or report by any Court of Justice or by any other competent public authority;

7th.—Every person who holds any office by virtue of which he is empowered to place or keep any person in confinement;

8th.—Every officer of Government whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety, or convenience;

9th.—Every officer whose duty it is, as such officer, to take, receive, keep, or expend any property on behalf of Government, or to make any survey, assessment, or contract on behalf of Government, or to execute any revenue process or to investigate or to report on any matter affecting the pecuniary interests of Government, or to make, authenticate, or keep any document relating to the pecuniary interests of Government, or to prevent the infraction of any law for the protection of the pecuniary interests of Government and every officer in the service or pay of Government or remunerated by fees or commission for the performance of any public duty;

10th.—Every officer whose duty it is, as such officer, to take, receive, keep, or expend any property, to make any survey or assessment, or to levy any rate or tax for any secular common purpose of any village, town, or district, or to make, authenticate, or keep, any document for the ascertaining of the rights of the people of any village, town, or district.

ILLUSTRATION.

A Municipal Commissioner is a public servant.

Explanation 1.—Persons falling under any of the above descriptions are public servants, whether appointed by the Government or not.

Explanation 2.—Wherever the words "public servant" occur, they shall be understood of every person who is in actual possession of the situation of a public servant whatever legal defect there may be in his right to hold that situation.

The following are rulings as to the term "public servant."

A. Bombay.

(i) *Reg. v. Nantam Ram Uttamraim*, S. B. H. C. Cr. 64 (1869) :

An engineer who receives municipal money and pays the same to contractors is a public servant though he has not the power to sanction expenditure of the same without the approval of another officer.

(ii) *Reg. v. Kalyanray*, Rat. Un. Cr. C. 36 (1870) :

A person appointed as a stamp vendor under the rules framed under Act X of 1862, after it had been repealed and substituted by Act XVIII of 1869, and not under the latter Act is not a public servant within the meaning of Section 21 (9).

(iii) *Reg. v. Ramaji Rav v. Jivbaji Rav*, 12. B. H. C. (1875) :

An officer is one to whom is delegated by the supreme authority some portions of its regulating and coercive powers and who is appointed to represent the State in its relation to individual subjects. He must be either himself armed with some authority or representative character, or his duties must be immediately auxiliary to those of someone who is so armed. Although *Deshmukhs* and *Deshpandes* would thus be sufficiently within the meaning of the clause, an *Izaphatdar*, i.e., a lessee, whose rights and liabilities arise out of a contract with Government, is not such an officer.

(iv) *Reg. v. Isub Musa*, Rat. Un. Cr. 117 (1876) :

A *karkun* employed by a Manager appointed under the Broach Thakur's Relief Act to execute revenue process and receive rents is a public servant within the meaning of Section 21 (9) as such *karkun* receive rents not only on behalf of the Thakur but also on behalf of the Government.

(v) *Queen-Empress v. Fula Bhana*, Rat. Un. Cr. C. 388 (1888) :

A watchman in the Kaira Collectorate who does the work of *rakha*, though not borne on the village records as a menial servant, and receives a portion of the emoluments assigned as remuneration for the services of a *rakha*, is a person in actual possession of the situation of a public servant within the meaning of explanation 2 of Section 21.

(vi) Queen-Empress *v.* Oodaji, Rat. Un. Cr. C. 389 (1888) :

A convict warden is not a public servant within the meaning of Section 21, (see *contra* 22 P. R. 1908).

(vii) Emperor *v.* Elias Ezekiel, 6 Bom. L. R. 54 (1904) :

A Municipal servant under the Bombay Municipal Act is a public servant within the meaning of Section 21 and is liable to be treated accordingly.

(viii) Emperor *v.* Babulal Kanaiya Lal, 10 Bom. L. R. 761 = 33 B. 213 = 8 Cr. L. J. 269 = 1 Ind. Cas. 869 (1908) :

A clerk in the Cess Collection Department of the District Municipality constituted under the Bombay Act (III of 1901) is a "public servant" within the meaning of Section 21 (10).

B. Allahabad.

(i) Emperor v. Khurshed, 175 A. W. N. 1885.

A conservancy Muharrir who receives a salary from the Municipal funds and whose duty it is to write and despatch reports as directed by the Superintendent of Conservancy is not a public Servant under Section 21.

(ii) Ishri v. Sital Parshad, 297 A. W. N. 1885 :

The Manager of a village under the Court of Wards is a public servant, within the meaning of the ninth clause.

(iii) Queen-Empress v. Parmeshar Dat, 8 A. 201 (1886) :

Any person whether receiving pay or not, who chooses to take upon himself the duties and responsibilities belonging to the position of a public servant, and performs those duties, and accepts those responsibilities, and is recognised as filling the position of a public servant, must be regarded as one ; it does not lie in his mouth to say subsequently that, notwithstanding his performance of public duties and the recognition by others of such performance, he is not a public servant.

(iv) Emperor v. Debidin, 295 A. W. N. 1886 :

To bring a case within Section 21 (6), there must be some cause or matter existing in dispute or controversy, in regard to which a competent public authority is desirous of a report to enable it to deal with the matter in dispute between the parties.

When a person was asked by the Municipal Commissioner merely to report if in carrying out the directions of the commissioners, he found any person objecting, it was held that such a report was not a report within the meaning of 21 (6), as his authority to report would have no effective existence until someone prevented his carrying out his direction.

(v) Queen-Empress v. Kalian Singh, 206 A. W. N. 1891 :

A person irregularly employed by a clerk in charge of criminal records to help him in his work during his absence on sick leave and who is *de facto* in charge of such records is a public servant under Section 21.

(vi) Queen-Empress v. Nand Kishore, 1 A. W. N. 1892.

A Moharrir of a police station ordered by his officer in charge to demand the weapons of offence from some accused persons, but without an order in writing as required by Section 165 Cr. P. Code is a public servant in discharge of his duty for the purpose of Section 332 when he is assaulted in attempting to carry out the order.

(vii) Queen-Empress v. Mathura Prasad, 21 A. 127 (1898) :

The Manager of an estate under the Court of Wards is a public servant within the meaning of Section 21 (see *contra* 28 C. 344).

(viii) Emperor v. Sidhu, 26 A. 542 (1903)

A gorait (in the district of Gorakhpur) like a chaukidar is a public servant within the meaning of Section 21.

C. Calcutta.

(i) *Emperor v. Butto Kristo*, 3 C. 497 (1878) :

A person appointed by the Government Solicitor, with the approval of Government, to act as Government Prosecutor is a public servant within the meaning of Section 21.

(ii) *Modun Mohun*, 4 C. 376 (1878) :

A poddar of the Bank of Bengal is not a public servant under Section 21 (9).

(iii) *Sheo Progash Tewari v. Bhoop Narain*, 22 C. 759 :

A Nazir of a Civil Court can delegate the execution of a warrant of arrest to a Civil Court peon and the peon acting in that capacity is a public servant within the meaning of Section 21 (following *R. v. Bhagi Dafadar*, 2 B. L. R. 21).

(iv) *Bajoo Singh v. Queen-Empress*, 26 C. 158 (1898) :

A Collector] acting in the management of *Khas Mehal* the property of Government, is as much the Government within the meaning of Section 17, as when he is exercising any other of the duties of his official position. A surveyor employed by the Collector in the *Khas Mehal* department for making a survey of a certain portion of a watercourse is a "public servant" within the meaning of Section 21.

(v) *Nazam-ud-din v. Queen-Empress*, 28 C. 344 (1900) :

An officer "in the service of pay of Government" within the meaning of Section 21 (9) is one who is appointed to some office for the performance of some public duty. A peon attached to the Office of the Superintendent of the Salt Department is a public servant within the meaning of Section 21 (9).

The Manager of an estate under the Court of Wards is not a public servant (see *contra* 21 A. 127 and 297 A. W. N. 1885).

(vi) *Ebrahim Sircar v. Emperor*, 29 C. 236 (1901) :

A receiver appointed under Section 56 of Bengal Act VII of 1876 (Land Registration) is not a public servant.

(vii) *Queen v. Kalla Chand Mistree*, 7 W. R. Cr. 99 :

Convict warders are public servant (followed in 22 P. R. 1908; see *contra* Rat. Un. Cr. C. 389).

(viii) Sundar Majhi v. Emperor, 30 C. 1084 (1903) :

An application was made by the parties to a proceeding under Section 145 to the effect that they were willing to refer the question of the land in dispute to an arbitrator. The arbitrator erected certain boundary pillars. It was held that the arbitrator so appointed was not a public servant authorised to put up boundary pillars.

(ix) Bhagwati Sahai v. Emperor, 32 C. 664 (1905) :

A clerk appointed by a Sub-Registrar and paid out of the allowance given to the Sub-Registrar calculated on the number of documents registered is not a public servant within the meaning of Section 21.

(x) Addaita Bhaia v. Kali Das De, 12 C. W. N. 96 = 6 Cr. I. J. 393 (1907) :

A Local Board Road Sircar is not a public servant within the meaning of Section 21.

(xi) Queen v. Ramakrishna Das, 7 B. L. R. 447 = 16 W R. Cr. 27 (1914) :

The peon of a Collector's court, who received no fixed pay from Government, but was remunerated by fees whenever employed to serve any process, and was placed on the register of supernumerary peons, and had been ordered by the Magistrate to do duty on a particular day at the office of the Sub-Registrar, was a public servant under the definition of the 9th clause of Section 21.

D. Madras.

(i) *In re Venkatigadu*, 1 Weir 342 (1879) :

The Mysore Police do not answer the description of public servants within the meaning of the Code. They have no authority to enter British Territory and make attempt to arrest persons suspected of crime. Persons using criminal force to them cannot be convicted under Section 353.

(ii) High Court Proceedings, 10th May 1881, 944, 1 Weir 27 = 1 Weir 129 :

A vaccinator is a public servant within the meaning of Sections 21 (8) and 186, whose duty it is to preserve the public health.

(See also H. C. Proceedings, 21st December 1871, 6 M. H. C. App. 48 ; in *In re Sooraparazu Singayya*, 1 Weir 134 = 1 Weir 621, it was questioned whether a vaccinator, not appointed by Government, is a public servant within the meaning of Section 21).

(iii) Queen v. Arayi, 7 M. 17 (1883) :

A person employed by the Manager of an estate under the charge of the Court of Wards is not a public servant within the meaning of that term in the Penal Code.

(iv) Queen v. Nachimuttu, 7 M. 18 (1883) :

Labourers or menial servants employed to do work on labour on account of the Government are not officers, and do not fall within the definition of public servant in Section 21.

(v) Queen-Empress v. Ramasami, 13 M. 131 (1889) :

A Municipal Inspector is a public servant within the meaning of Section 41 of Madras Act, IV of 1884 (District Municipalities). If he is assaulted in the execution of a distress, the person assaulting is liable under Section 353, I. P. C.

(vi) Subromanya v. Somasundara, 15 M. 127 (1891) :

A zemindari *Karnam* is a public servant and is bound by law to produce accounts to the proprietor or farmer.

(vii) *In re Gopalasaminatha Aiyen*, 1 Weir 28 (1893) :

A union *Karnam* is a public servant within the meaning of Section 21.

E. Punjab.

(i) Queen-Empress *v. Zakaria*, 9 P. R. 1898 :

The term "public servant" includes also a "goods clerk."

(ii) King-Emperor *v. Muhammada*, 22 P. R. 1908 :

Convict warders and Overseers are public servants within the meaning of Section 21.

(This ruling followed the Calcutta ruling, 7 W. R. Cr. 99, and Section 23 of the Prisons Act, 1894).

F. Burma.

(i) King-Emperor v. Nga Paw, E. V. B. R. (1916) 3rd qr-
122 10 Bur. L. T. 170.

A villager required to bring an accused person into a Police Station in arrest is not a public servant within the meaning of Section 21. "To hold that a villager assisting a headman in the discharge of his duties is a public servant appears to me to be quite unjustifiable. The headman has to perform very miscellaneous and varied duties, and it would be a mere abuse of language to suggest that every time he calls upon a villager to assist him in the discharge of those duties the villager is converted into a public servant. If this were so it would be possible to argue that a person who is called upon to assist a Magistrate or Public Officer demanding his aid under Section 42 Cr. P. C. or a person arresting an accused under Section 59 was a public servant, a view for which there can be no justification."

STATUTORY PUBLIC SERVANTS.

The following are public servants under the provisions of certain acts :—

Delegates	... Parsi Marriage and Divorce Act, 1865 (23).
Protectors and Medical Inspectors of Emigrants	...
Registrars	... Indian Emigration Act, 1908 (12,14).
Forest Officers	... Indian Registration Act, 190 (84).
Judges, Assessors, Officers and Surveyors	... Forests Act, 1878 (72).
Bailiffs and Appraisers	... Merchant Shipping Act, 1880 (50).
Persons hearing appeals relating to licenses.	... Small Cause Courts Act, 1882.
President of a Board	... Burma Steam Boilers Act, 1882.
Surveyors of Steamships and investigators of explosions thereon.	... Burma Pilots Act, 1883.
Registrars	Inland Steam Vessels and Steamships Act, 1884.
Kanungoes and Patwaris	... Births, Deaths and Marriages Re- gistration Act, 1886 (14).
Examiners and officers and servants of the Allahabad University University of Allahabad.	... N.W. Provinces and Oudh Act, 1889.
Councilors, etc., of Bombay Municipality	... Allahabad University Act, 1887.
Prisoners who have been appointed officers of prisons.	... Bombay Act, III of 1888.
Inspectors of Mines	... Prisons Act, IX of 1894 (23).
Officers and servants employed by the trustees.	... Indian Mines Act, 1901 (4).
	... Victoria Memorial Act, X of 1902.

Inspectors	... Indian Factories Act, 1911 (4).
Pound-keepers	... Cattle Trespass Act, 1871 (6).
Officers and Servants	... Indian Museum Act, 1876 (13).
Coroners	... Coroners Act, 1871 (5).
Inspectors	... Glanders and Farcy Act, 1899 (4).
Census Officers	... Indian Census Act, 1910 (3).
Persons employed by the Court	... Bengal Court of Wards Act, 1879 (59 A).
Registrar of Mutations	... Bengal Land Records Maintenance Act, 1895 (33).
Certain Officers and Tax Collectors	... Calcutta Municipal Act, 1899 (646).
Superintendents and Park Durwans	... Bengal Public Parks Act, 1904 (7).
Forest Officers	... Madras Forest Act, 1882 (60).
Municipal Servants and others	... Madras District Municipalities Act, 1884 (41).
Ditto	ditto
Local Board's Servants	... Madras City Municipality Act, 1904 (465).
Conservators of rivers, Surveyors, &c.	... Madras Local Boards Act, 1884 (43).
Persons empowered under Section 7	... Madras Rivers Conservancy Act, 1884 (23).
Persons appointed to hear appeals	... Madras Canals and Public Ferries Act, 1890 (11).
Guardian and Manager	... Punjab Steam Boilers and Prime Movers Act, 1902 (12).
Transport Registration Officers	... Punjab Court of Wards Act, 1903 (42).
	... Punjab Military Transport Animals Act, 1903 (4).

Reference may also be made to the following Acts :—

Oudh Taluqdars Relief Act, 1870 (22); Broach Thakurs Relief Act, 1872 (17); Chota Nagpur Incumbered Estates Act, 1876 (21); Pegu and Sittang Canal Act, 1881 (14); Burma Forest Act, 1881 (71); U. P. Municipal Act, 1900 (51); U. P. District Boards Act, 1906 (41); U. P. Steam Boilers and Prime Movers Act, 1889 (12).

(NOTE.—The above list is probably not complete.)

The next most important question after considering whether the person assaulted or hurt is or is not a public servant, is whether he was acting in discharge of his duties as a public servant.

The rulings dealing with this question will now be cited.

A. Bombay.

(i) *Reg. v. Vyankatrv*, 7 B. H. C. R. Cr. C. 50 (1870).

When a Police constable subordinate to a station house officer entered a house for search without a warrant, which he had no right to do, it was held that obstruction to him was nevertheless an offence in the absence of proof that he did not act in good faith and under colour of his office.

(ii) *Rakmaji*, 9 B. 558 (1885).

The rules or execution orders of Government printed at pages 26 and 27 of Mr. Nairne's Revenue Hand-book have not the force of law. A peon who was deputed by the Forest Officer "to impress 15 carts for his use" was not acting in the execution of his duty as a public servant when he seized the accused's cart and the accused could not be convicted under Section 353 but only under Section 352 (referred to in 38 P. W. R. 1913).

(iii) *Queen-Empress v. Tulsi Ram*, 13 B. 168 (1888).

The accused obstructed a Surveyor who was sent by the Collector to measure off rice land in the possession of the accused and to give possession of it to the decree-holder in a suit brought against the accused in the Mamlatdar's Court under Bombay Act III of 1876 (Mamlatdar's Courts). It was held that, as the Collector had no authority to issue such an order to the Surveyor, the latter, acting under the Collector's order, was not discharging a public function. The Surveyor was not protected by Section 99 for though he was acting under the direction of the Collector still the Collector's order was so entirely *ultra vires* as to leave no room for the operation of the section. The protection given by the section to a public officer does not extend to an officer whose act is altogether illegal.

(iv) *Queen-Empress v. Ross*, 22 B. 746 (1896).

At a race meeting held at Poona under the auspices of the Western India Turf Club on enclosed ground lent for the purpose by the Military authorities, the complainant, an Inspector of Police, who was present there on duty in that

capacity, came into the first enclosure over the ropes, which were used to fence the enclosure, passing through the pickets of soldiers who were stationed along the ropes to prevent people from entering and leaving the enclosure otherwise than by one of the regular entrances provided.

This entrance being reported to the Honorary Secretary of the Club, he directed two soldiers to put the Inspector out of the enclosure. These men took hold of the Inspector, and then let him go at his request and escorted him outside the enclosure. It was held that the Secretary was liable to be convicted under Section 353, as Section 47 of the Police Act empowered the Police Inspector to be present at the race ground, a place of public amusement and resort, for the purpose of preserving peace and order.

(v) *Emperor v. Thave Issaji Boree*, 13 Bom. L. R. 635 = 11 Ind. Cas. 993 = 12 Cr. L. J. 457 (1911).

A Sub-Inspector and a Constable in the Abkari department were proceeding to search a man whom they suspected of possessing cocaine ; the accused assaulted first the constable and then the Sub-Inspector and escaped. It was held that the accused was rightly convicted under Sections 353 and 186.

B. Allahabad.

(i) Empress v. Diwan Singh, 244 A. W. N. 1885.

When a public servant was authorised by the Tahsildar to distrain some property, an assault committed on him to deter such distraint amounts to an offence under Section 353, notwithstanding that the Tahsildar had omitted to make a proper endorsement on the warrant.

(ii) Queen-Empress v. Janki Prasad, 8 A. 293 (1886).

A judgment-debtor resisted the execution of a warrant which was initialled only. It was held that although it is proper that a person signing a warrant should write his name in full, it could not be said that because the signature was confined to the initials of the name, it was not the duty of the officer to execute the warrant and therefore the offence fell under Section 353.

(iii) Queen-Empress v. Dalip, 18 A. 246 (1896).

A Magistrate had issued a warrant under Section 110 for the arrest of a person and the warrant was addressed and sent to the officer in charge of a particular thana for execution. After being copied at the thana, the original warrant was made over to a particular constable for execution. When that constable had left the thana to execute it, it was ascertained that the person to be arrested was in a different village. Therefore the officer who was temporarily in charge of the thana wrote on the back of a copy of the warrant the names of some other constables whom he ordered orally to proceed to the village where the person was and to arrest him. They were in arresting him attacked by the accused and the person was rescued. It was held that the Police officers were not acting under an order in writing made under Section 56, Criminal P. C., and that they were not in the discharge of their duties at the time when they were assaulted, and that the case did not come under Section 332, but inasmuch as the constables acted in good faith and under colour of their office, the accused was guilty under Sections 147 and 323 read with Section 99.

The words "in discharge of his duty" mean that the officer has a duty to discharge and is discharging it at the particular time. They cannot mean that the officer is acting under colour of his office.

(iv) Emperor v. Narbadashwar, 27 A. 491 (1905).

A warrant was issued under Section 174, C. P. C., read with Section 193, N. W. P. Tenancy Act, for the arrest of certain witnesses. One of them was arrested but rescued and the officers entrusted with the warrants were also assaulted. Previous to the issue of the warrant there had been three summonses, but they were all affixed to the houses of the persons to be served, the serving officer not being able to serve the summonses personally. The Court did not comply with the provisions of Section 82, previous to the issuing of the warrant, although the Court was of opinion that there was due service of summonses, and that the witnesses were keeping off the way intentionally. It was held that the warrant was not absolutely illegal and that even if the accused were not liable to be convicted under Section 225 B, they were liable to be convicted under Section 353.

(v) Emperor v. Bahal, 28 A. 481 (1906).

A vaccinator attempted, against the wishes of the child's father, to vaccinate a child. The father and some of his relatives intervened and assaulted the vaccinator but did not do him any particular harm. It was held that the child's father and other relatives were perfectly justified in interfering and under the circumstances could not be said to have acted in excess of their right of private defence.

(vi) Emperor v. Radhe Lal, 29 A. 272 (1907).

The Collector or Assistant Collector in the charge of a subdivision are bound to exercise the power of attachment conferred on him by Sections 147 and 227, clause 16 of the U. P. Land Revenue Act themselves, and they have no right to delegate that power generally to the Tahsildar. Therefore when a Collector delegated his authority to a Tahsildar to exercise the power of attachment for default of revenue under Section 147, and the Tahsildar in exercise of that power seized the property of some of the land-holders and was resisted, it was held that the order was illegal, but that the convictions might be upheld under Sections 352 and 147, I. P. C., since the persons seizing it were acting in good faith under colour of their office.

(vii) Emperor v. Altaf Mian, 186 A. W. N. 1907 = 6 Cr. L. J. 22.

An accused person struck a Sub-Inspector of police, who was in the witness box giving evidence against him. It was held that the offence of which the accused was guilty

in this respect was that provided for by Section 355 than that punishable under Section 332.

(viii) *Meharban Singh v. Emperor*, 9 Ind. Cas. 669 = 12 Cr. L. J. 112 (1911).

The assaulting of a *malguzar*, who was holding an enquiry into the matter of damage done to a Government Forest is not an offence under Section 353, because the holding of such enquiry is not one of the legitimate duties of the *malguzar*.

(ix) *Emperor v. Gopal Singh*, 36 A. 6 (1914).

A Police constable having knowledge that a warrant of arrest in respect to a cognizable offence was outstanding against a certain person, attempted to arrest that person and in so doing was assaulted and prevented from effecting the arrest. It was held that the existence of the warrant was equivalent to "credible information" that the person in question had been concerned in a cognizable offence within the meaning of Section 54 (i), C. P. C., and that the persons preventing the arrest were properly convicted under Section 353. (Note, 18 A. 246 was distinguished as the case therein was not a cognizable case).

(x) *Emperor v. Mukhtar Ahmad*, 37 A. 353 (1915).

An Excise Inspector in searching the house of a person under suspicion that he would find cocaine there committed many irregularities. He had no warrant authorising him to make the search; he had brought only one search witness and he directed a constable to scale the outer wall of the house. The accused assaulted and beat him. It was held that the Inspector and the constable were not acting in discharge of their duties as public servants, and that the accused were not guilty under Section 332, but only under Section 323.

"A finding that the Excise Inspector and the constables were resisted at a time when they, being public servants, were acting in good faith under colour of their office, is not the same thing as a finding that they were acting in the discharge of their duties as public servants. The distinction is pointed out in *Queen-Empress v. Dalip*.

(xi) *Madho Sonar v. Emperor*, 13 A. L. J. 691 = 16 Cr. L. J. 589 = 30 Ind. Cas. 141 (1915).

The Sub-Inspector of Kuraon sent an intimation to the Sub-Inspector of Manda that he intended to search a house within the jurisdiction of the latter officer, and secured the

presence of a constable to help in carrying on the search, but the constable had no authority from his Sub-Inspector either verbal or in writing. It was held that the provisions of Sections 165 and 166, C. P. C. were not complied with, and a person resisting the search was not guilty of an offence under Section 353.

(xii) *Jafar v. Emperor*, 14 A. L. J. 789 = 17 Cr. L. J. 529 = 36 Ind. Cas. 577 (1916).

Two chaukidars arrested one F on suspicion that he was in possession of stolen property. While he was being taken to the police station he was rescued from the custody of the chaukidars by certain persons. It was held that the chaukidars were not members of the Police force, and had no authority to arrest F on mere suspicion inasmuch as Section 52 of Act XX of 1856 whereunder they had been appointed was repealed by the United Provinces Town Areas Act (II of 1914), Section 41.

(xiii) *Emperor v. Madho*, 40 A. 28 (1918).

A Police constable was assaulted while endeavouring to enforce an order passed by the District Magistrate as to the carrying of *lathis* by *pragvals* which order, if originally lawful, had in any case become obsolete. It was held that the persons who assaulted the constable could not be convicted under Section 332 but only under Section 323.

(xiv) *Bhim Singh v. Emperor*, 17 A. L. J. 115 = 49 Ind. Cas. 494 (1919).

The accused's brother was suspected of having committed a theft. The complainant, an Inspector of Police, went to search his quarters ; whereupon the accused assaulted the complainant. It was held that the accused's brother was not an accused person at the time but a mere suspect, and the search was not illegal, and was justified under Sections 94 and 165, Cr. P. C., and that the accused was guilty under Section 353.

(xv) *Nirmal Singh v. Emperor*, 42 A. 67 (1919).

An officer of Police, who is empowered to conduct an investigation, is entitled to carry out a search without a warrant ; but he is bound under Section 103, C. P. C., to call upon two or more respectable inhabitants of the locality to attend and witness the search ; and if he omits to do so, a house-holder would be justified in closing the door and refusing ingress into the house ; and would not be guilty of an offence under Section 332. The owner or occupier is not, however, justified in using more force than is necessary for such purpose.

C. Calcutta.

(i) *Jagarnath Mandhata v. Queen-Empress*, 24 C. 324 (1897).

When the accused offered resistance to an Excise Sub-Inspector in his attempt to search the house of one of the accused persons for *Gurjat Ganja*, it was held that *Gurjat Ganja* was a foreign excisable article as defined in Section 4 of Act VII of 1878 as amended by Act IV of 1881 (Bengal Excise and Licensing Act) and consequently the Excise Officer had no legal authority to enter and search the house and the accused were not therefore guilty under Section 353.

(ii) *Tafazzul Ahmed Chowdhry v. Queen-Empress*, 26 C. 630 (1899).

When a warrant of attachment under which a Nazir acted was not produced in Court nor was secondary evidence given, after proper steps taken to produce the original had failed, to prove its contents, it was held that the accused could not be convicted under Section 353 for assaulting the Nazir.

(iii) *Chunder Coomar Sen v. Queen-Empress*, 3 C. W. N. 605 (1899).

In the absence of any evidence as to the terms of a warrant either by production of the original or by secondary evidence, a conviction for resisting a public servant in executing the warrant cannot stand.

(iv) *Mangobind Muchi v. Emperor*, 3 C. W. N. 627 (1899).

As a vaccinator cannot insist upon taking lymph from the arm of any person objecting to it, an attempt by him to take lymph, notwithstanding the objection, is unlawful and resistance to such an attempt will not amount to an offence under Section 353.

(v) *Raman Singh v. Queen-Empress*, 28 C. 411 (1901).

Three persons refused to act as special constables and one was arrested and set himself free. Held that a conviction under Section 353 could not be sustained.

(vi) *Rajani Kanto Pal v. Emperor*, 5 C. W. N. 843 (1901).

It may be that in order to make an arrest upon a warrant of a civil court valid, it may not be necessary to show the warrant; but it is the duty of the bailiff to acquaint the person

with the contents of the warrant at the time he arrests him and that he was authorised to arrest him, and if the person then wants to see the warrant, it is the duty of the bailiff to show it to him.

(vii) *Abinash Chandra Aditya v. Ananda Chandra Pal*, 31 C. 424 (1904).

Under Section 251, C. P. C., 1882, it is the duty of the Court to specify in a warrant for execution of a decree, whether it be a decree for delivery of possession or otherwise, the day on or before which the warrant must be executed. A Commissioner has no authority after the expiry of the date mentioned in the warrant to enter upon the land in possession of the party and resistance offered to such execution would not amount to an offence under Section 353.

(viii) *Abdool Karim . Emperor*, 4 C. L. J. 92 = 4 Cr. L. J. 71 (1905).

When a person is arrested for an offence not really under warrant, the mere fact that a warrant had been issued for his arrest, which warrant had been executed against other persons, who had since been convicted, can hardly be put forward as a justification for his arrest. When the arrest of a person, who was gambling in an open place in view of the police is sought to be justified as having been made under Section 74 of the Calcutta Police Act (IV of 1866), it must be found that the place where the gambling was taking place was a common gaming house. The presumption referred to under Section 46 of the Calcutta Police Act cannot arise in a case where the arrest is not made on a warrant.

(ix) *Bolai De v. Emperor*, 35 C. 361 (1908).

A certain person committed theft. Sometime after the Daffadar, on information, arrested the thief. The accused rescued the thief from the custody of the Daffadar and attempted to beat him. It was held that accused were not liable either for rescuing or for the attempt at beating inasmuch as the arrest by the Daffadar was illegal under Section 39 (2) of Bengal Act VI of 1870 (Village Chaukidari) the theft not having been committed in his presence and the offence of theft not being a continuing one.

(x) *Sheikh Nasur v. Emperor*, 37 C. 122 (1910).

Under Order 21, rule 24, Cr. P. C., the day on which the warrant should be executed shall be specified in the warrant.

The person against whom a warrant is sought to be executed is entitled to see the warrant, not only for the purpose of satisfying himself as to the amount, but also for the purpose of satisfying himself that the person who seeks to execute the warrant is legally authorised to do so. A warrant issued under Section 45 of the Chaukidari Act (VI of 1870) must contain the name of the person who is to execute it, and only that person who is named in the warrant can lawfully execute it.

(xi) *Gora Mian v. Abdul Majid*, 39 C. 403 (1912).

An exactly similar finding to that of *Gurameeah v. King-Emperor* and *Bisu Haldar v. Emperor* was similarly distinguished.

(xii) *Gurameeah v. King-Emperor*, 16 C. W. N. 336=13 Ind. Cas. 1002=13 Cr. L. J. 186 (1912).

There being no printed form for search warrants under Section 100, Cr. P. C., printed forms issued under Section 98 are always used with the necessary modifications for that purpose. When such a warrant was drawn up on a form for use under Section 98, and was snatched away and destroyed by the persons accused of resisting the execution of the warrant, it was held that, as the accused destroyed the warrant, it must be presumed that the warrant under Section 100 was properly drawn up on a form under Section 98 with the necessary modifications and that the error, if any in the warrant, supposing that the necessary modifications had not been made, would be one of form only. (This case was distinguished from *Bisu Haldar v. Emperor*, 11 C. W. N. 836=6 C. L. J. 127=6 Cr. L. J. 38, wherein on the complaint of the husband that his wife was wrongfully confined a search warrant under Section 96 was issued for the arrest of the wife and it was held that the accused had a right of private defence as the warrant issued was wholly illegal.)

(xiii) *Shayana Churu Mujumdar v. King-Emperor*, 16 C. W. N. 549=15 Ind. Cas. 1006=13 Cr. L. J. 590 (1912).

When, on a warrant providing for bail, a constable arrests a man without giving him intimation that bail had been allowed, persons who assaulted the constable and rescued the man are not guilty of any offence as the man was not in lawful custody, inasmuch as the constable did not ask him whether he could give the required bail.

(xiv) Preo Lal Mukerjee v. King-Emperor, 18 C. W. N.
548 = 15 C. L. J. 427 = 24 Ind. Cas. 163 (1914).

The petitioner was convicted under Section 353 of having assaulted a civil peon when executing a writ of delivery of possession of a share in a tank by ordering some fishermen to cast their nets in a tank and catch fish for the decree-holder as provided in the writ ; it was held that, whatever mistake there might be in the procedure of the Munsiff in giving the direction in the writ, the petitioner had no right of private defence under Section 99, I. P. C., against the peon who was a public servant acting under colour of his office and in good faith.

D. Madras.

(i) *In re Latchmana Goundan*, 1 Weir 343 (1883).

A Police constable who is deputed to investigate a non-cognizable case has no power of arrest without a warrant. Therefore a village Munsiff who remonstrated with the constable against such arrest and assaulted him was held not to be guilty under Section 353 but under Section 352.

(ii) *In re Perumalu*, 1 Weir 344 (1885).

A Magistrate gave a general direction to his orderly to bring to him persons found selling fruit unfit for human food (Section 273, I. P. C., a non-cognizable offence). In execution of this order, the constable endeavoured to compel two persons to go with him before the Magistrate considering that these persons were selling fruit in a noxious state. The accused refused to go with the constable and assaulted him when he endeavoured to lay hold of them. It was held that the accused could not be convicted either under Section 353 or Section 323 inasmuch as the order of the Magistrate which the constable obeyed was not a legal order and as the constable could not, in good faith, have believed that he was justified in using force to compel the attendance of the accused before the Magistrate, since it should be presumed that a Police constable was aware of the difference between a cognizable and a non-cognizable offence.

(iii) *Queen-Empress v. Pukot Kotu*, 19 M. 349 (1896).

A Sub-Inspector of Salt attempted without a search warrant to enter a house in search of property, the illicit possession of which is an offence under the Madras Abkari Act, and was obstructed and resisted. It was held that, having regard to Section 99 of the Penal Code, even though the Sub-Inspector was not strictly justified in searching a house without a warrant, the persons obstructing and resisting could not set up the illegality of the officer's proceeding as a justification of their obstruction as it was not shown that the officer was acting otherwise than in good faith and without malice. It had been found by the District Magistrate that the accused had not used more force than was required for the purpose of preventing the search until the requirements of law were fulfilled; and he had reversed the convictions under Sections 147 and 353, but these convictions were restored by the High Court.

(iv) Queen-Empress *v.* Tiruchittambala Pathan, 21 M. 78 (1898).

In a case where a public servant does an act of a kind which he has no authority to do, he could not be acting in discharge of his public functions and the lawful authority required by Section 183 would be wanting. If on the other hand the act of the public servant is an act of the kind which he is authorised to do, no miscarriage on his part, due to an honest mistake of fact, could render him liable to prosecution. Resistance to such an act, or an assault on him in the course of doing the act, is punishable under Section 183 and Section 353 respectively ; e.g., where execution was taken out and the Amin of the Court attempted to attach and seize certain goods in the possession of the accused as forming part of the assets of a deceased debtor ; in such a case the Amin has lawful authority to take in execution the goods of the deceased though he may act erroneously regarding a matter which did not affect the nature of his authority.

(v) Queen-Empress *v.* Poomalai Udayan, 21 M. 296 (1898).

The accused failed to pay the tax due on his house after service of notice of demand, which was affixed to his house. There was an omission in the notice of demand in that one column of the house register was not filled up. The accused not having paid the tax, a warrant of distress was issued. The distraint was resisted by the accused and he recovered and retained his articles. It was held that the omission to fill up one column of the house register was covered by Section 155, clause 1 of the Act (Madras Act V of 1884, Local Boards) and that the service of notice was regular and he, the accused, in resisting the distraint, had committed an offence under Sections 186 and 353, I. P. C., inasmuch as the accused had no right of self-defence, the act of the officer being an act done in good faith and under colour of his office.

(vi) *In re* Pethan Kovan, 1 Weir 345 (1900).

The accused being called upon to produce his child for vaccination refused to do so. The vaccinator then directed the village Talayari to enter and bring out the child from the house of the accused. The accused took hold of a spade and threatened to strike anyone who should enter his house. It was held that the accused could not be convicted under Section 353 for a vaccinator had no compulsory powers of vaccination.

(vii) Dorasawmy Pillay v. Emperor, 27 M. 52 (1903).

A constable who enters upon the premises of a person who was regarded as a suspicious character at midnight, and knocks on the door to ascertain if he is there, is not engaged in the execution of his duty as a public servant, and is technically guilty of house trespass, and the accused was justified in causing the slight harm which he had inflicted on the constable.

(viii) Venkatappa Naidu v. King-Emperor, 17 M. L. J. 323=6 Cr. L. J. 105 (1908).

An Inspector acting under Section 165, Cr. P. C., seated himself outside the house of the accused and sent a constable into the house to conduct the search. The accused asked the constable for a list of the articles he had come to search for and when none was produced, he objected to the search being carried out by the constable and pushed him out. It was held that the accused could not be convicted under Section 353. The Inspector himself should have personally conducted the search, and he was not justified in sitting outside and directing a subordinate to search, without giving a written order specifying the articles to be searched for.

(ix) *In re Bozagellaya*, 19 M. L. J. 238=4 Ind. Cas. 1166=11 Cr. L. J. 200 (1910).

A vaccinator is not discharging any duty under the law, when attempting to vaccinate a child against the will of its parents, in a place where vaccination is not compulsory; and so any person preventing him from doing so cannot be said to have committed any offence under Section 353.

(x) *In re Mahomad Yakub*, 7 M. L. T. 386=6 Ind. Cas. 12=11 Cr. L. J. 221 (1910).

A constable was employed to watch the accused, and the accused knew of it when he assaulted him. It was held that the constable was not doing anything in excess of his authority at the time of the assault, and the accused was rightly convicted under Section 332. The duty need not be a particular duty imposed expressly by law on the particular occasion.

(xi) *In re Parasurama Asari*, 9 M. L. T. 1688=Ind. Cas. 881=11 Cr. L. J. 727 (1910).

When at the search of accused's house by a Head Constable under orders of the Sub-Inspector the accused assaulted the constable and prevented his entering the house, it was

held that the accused was guilty of an offence under Section 353 as the Head Constable in conducting the search was obeying the order of his superior officer, and that Section 165 (3) C. P. C., did not apply to the case.

(xii) *Ratna Mudali v. King-Emperor*, 40 M. 1028 (1917).

A Police officer is justified in making an arrest under Section 54, Cr. P. C., of a person against whom a charge of having committed a cognizable offence has been preferred, though the warrant issued for the purpose had not been entrusted to him; and a person obstructing and beating such an officer while he is attempting to arrest the offender is guilty of an offence under Section 332.

(20 C. W. N. 1233, 1916 (*in re Charu Ch. Majumdar*) was distinguished on the ground that no warrant had been issued. In that case it was laid down that Section 54, C. P. C., gives a Police officer personal authority and involves personal responsibility and the "reasonable suspicion," "credible information" must be based upon definite facts which the public officer must consider for himself before he acts under this section; he cannot delegate his discretion or take shelter under the belief or judgment of another Police officer.)

Punjab.

(i) *Ali v. The Empress*, 24 P. R. 1880.

A mounted constable had been deputed to make an enquiry in the course of which he searched the accused's house. The accused assaulted him and was convicted under Section 353. It was held that a Police constable deputed by his superior to make an enquiry must be held to be a Police officer making an investigation within the meaning of Section 379, Cr. P. C., and as such authorised to conduct a search. The word "officer" is used throughout the Police Act (V of 1861) to include all persons serving in the police, and it is also to be observed that where the expression is intended to be applied in the Cr. P. C. to a superior officer, words to that effect and showing such intention immediately follow, e.g., in Section 337. The mounted constable was therefore authorised by law to make the search, and as the accused assaulted him in the discharge of his duties, the conviction was right.

(ii) *Chhajju Mal v. Emperor*, 76 P. L. R. 1903.

The accused entered a compartment of a Railway carriage reserved for females to assist his wife who was to travel in that compartment. A constable of the Railway Police having interfered and some quarrel having ensued, the accused was convicted of an offence under Section 332. It was held that the conviction was illegal. Entry into a compartment reserved for females without lawful excuse is forbidden, but the accused had the best of all excuses for entering the carriage. The constable acted *ultra vires* in interfering, as the Railway Police are not allowed to do so until they are called upon by the Railway authorities.

(iii) *Sharaf Khan v. Emperor*, 114 P. L. R. 1903.

The accused were convicted of offences under Sections 225, 332, and 224, 353. It was urged on their behalf on revision that a search under the Arms Act which gave rise to the alleged obstruction and use of criminal force on their part, was illegal, inasmuch as it was made at night, and was not restricted to the procedure laid down in Section 25 of the Arms Act (XI of 1878). It was held maintaining the convictions, that a search by night is not illegal, and, in cases under the Arms Act is not restricted to the procedure laid down in Section 25 of the Arms Act which does not override Section 165 Cr. P. C.

(iv) *Crown v. Allah Bakhsh*, 105 P. L. R. 1904 = 1 Cr. L. J. 956.

An excise *chaprasi*, with the avowed object of seeing if *chandu* was being manufactured, ascended the stairs of the house of accused No. 1, and looked into the place where accused No. 1 and his wife were sitting. Accused No. 1 came to the door, shoved him down the stairs and followed him, when accused No. 2 came in and hit him. It was found that the *chaprasi* was not injured in any way. The accused were convicted under Section 353. It was held that the conviction was illegal. Accused No. 1 was justified in turning out the *chaprasi* for he was not authorized to enter the premises of the accused even with the object of seeing if *chandu* was being manufactured. Such power is given under Section 4 of Act I of 1878 only to an officer of the Excise Department, superior in rank to a peon, who may be so authorized by the Local Government.

(v) *Crown v. Yusaf Alla Ditta*, 18 P. R. 1910.

Under section 54, Cr. P. C. a police officer investigating a charge of burglary, a cognizable case, is empowered to arrest, without an order from a Magistrate on a warrant, persons against whom a reasonable suspicion of having been concerned in the burglary existed, and so the persons assaulting the police officer while arresting them would be guilty under Section 332.

(vi) *Hardit Singh v. Emperor*, 161 P. L. R. 1911 = 12 Cr. L. J. 236-10 Ind. Cas. 278.

Section 332 has no application to a case where canal officials were assaulted in attempting the rescue of some cattle, which were their own private property, as they were acting as private individuals.

(vii) *Emperor v. Gaman*, 16 P. R. 1913.

In a search warrant issued under Section 100, the name and designation of the police officer or other person who was to execute the warrant was inadvertently omitted. The warrant was made over to the Assistant Court Inspector who, by an endorsement, sent it to the Sub-Inspector of the Thana and not to the officer for the time being in charge of the Thana. When the warrant reached the Thana, the Sub-Inspector was temporarily absent, and the Head Constable who was for the time being in charge of

the Thana, proceeded to execute the warrant. The woman searched for was found and apprehended with a view to producing her in Court in accordance with the warrant. It was held that the accused would not be convicted under Sections 225 B. and 332, but under Sections 147 and 323.

(viii) Emperor *v.* Amir Khan, 183 P. L. R. 1913=19 P. W. R. 1913=14 Cr. L. J. 141 = 18 Ind. Cas. 893.

An assault made on a public servant acting in obedience to the orders of his superiors is punishable under Section 353, the question whether these orders were right or wrong being immaterial in the case. A tahsil *chaprasi* was sent by the Tahsildar to seize camels for transport. The camelmen assaulted the *chaprasi* while he was in the act of seizing the camels. It was held that the camelmen were guilty of an offence under Section 353.

(ix) Asa *v.* The Crown, 38 P. W. R. 1913=325 P. L. R. 1913=14 Cr. L. J. 512 = 20 Ind. Cas. 992.

A Tahsildar deputed his peon by a written order to procure some camels for the camp of the Settlement Officer. When the peon attempted to seize the petitioner's camels, the latter assaulted the former and prevented him from seizing the camels. It was held that the petitioner committed no offence.

The words "duty as such public servant" in Section 353 mean duty imposed by law on such public servant, and do not include acts done in good faith under colour of his office by such public servant. The law imposes no duty on any revenue official to seize animals belonging to private individuals for purposes of camp transport, and gives them no power to seize such animals forcibly. Executive officers are not entitled to require owners of such transport to supply it; nor are the owners declining to supply such transport guilty of an offence by the mere act of refusal. And if in protecting his property against an illegal seizure, the owner assaults the official making such seizure, he is protected by law, provided he does not exceed the limits laid down in Chapter IV. The words "public servant acting in good faith under colour of his office, though their act may not be strictly justifiable by law," in Section 99 has no application to a case where the initial proceedings and the power under which a public servant purports to act are altogether without jurisdiction and are *ultra vires*.

(Note.—The last paragraph followed Queen-Empress *v.* Jogendra Nath Mukerjee, 24 C. 320, and reference was also made to 9 B. 558 and 13 B. 168).

(x) Attar Singh v. The Crown, 9 P. R. 1918.

A warrant of arrest was issued for the arrest of an abducted woman in a Section 498 case. The warrant erroneously charged the woman herself with an offence under Section 498. A Head Constable arrested the woman and was taking her away, when a large concourse of people assaulted and took away the woman from the custody of the Head Constable and inflicted certain injuries on him. It was held (following King-Emperor v. Gaman) that though resistance to the execution of the warrant might be held to be justifiable and Sections 332 and 225 not applicable, the accused were guilty under Section 147.

F Patna.

(i) *Mohini Mohan Banerji v. King-Emperor*, 1 Pat. L. J. 550 = 36 Ind. Cas. 871.

When a Civil Court issued a warrant directed to the bailiff of the Court directing him to seize certain goods in the accused's workshop and the warrant specified no day upon which or before which the warrant was to be executed and the Nazir of the Court, who sought to enter the defendant's house to execute the warrant, was resisted, it was held that the accused committed no offence. The Nazir was not the person who was clothed with lawful authority under the warrant to execute it. If he took upon himself the voluntary execution of it, the execution so made was not in pursuance of the warrant and was not lawful (37 C. 122). The warrant was also bad because it is absolutely blank in point of time and would operate as a continuing authority indefinitely (40 C. 849).

(ii) *Jagpat Koeri v. King-Emperor*, 2 Pat. L. J. 487.

A Magistrate ordered a warrant to be issued against an accused person. The warrant was issued but was signed, not by the Magistrate who took cognizance of the case, but by an Honorary Magistrate who lived in the same town. Before the execution of the warrant the accused surrendered and was released on his personal recognizance. When the constables to whom the warrant had been issued tried to arrest him on the following day, the accused, with the assistance of three other persons, effected his escape. All the four were convicted under Section 353. It was held that the conviction was bad as the warrant, having been signed by an unauthorised person contrary to Section 75, Cr. P. C., was invalid; and that whether the warrant was valid or not, the accused should not have been arrested, seeing that he had surrendered and been released on his personal recognizance.

(iii) *Khidir Bux v. Emperor*, 3 Pat. L. J. 636 = 49 Ind. Cas. 171.

Where an attachment warrant is not sealed with the seal of the Court, it is not an offence to resist the attachment, and a charge of rioting cannot be sustained.

G. Burma.

(i) Nga Nan Da . Emperor, 3 U. B. R. (1919), 176 = 54 Ind. Cas. 577.

Accused, who was in illegal possession of opium, was ordered by an Excise Inspector to stop, and the latter fired two shots to frighten him. The accused turned round and wounded the Inspector with his sword. He was then caught, and while a peon was proceeding to disarm him, the accused wounded the peon also with his sword.

Held (1) that the Inspector was entitled to arrest the accused and for that purpose to use all necessary means ;

(2) that he was not however justified in causing death in effecting the arrest ;

(3) that inasmuch as apprehension of death had been caused to the accused he had a right of private defence against the Inspector which had not been exceeded ;

(4) that the accused had no right of private defence against the peon after he had been caught and that therefore he was guilty of causing grievous hurt to a public servant in discharge of his duty under Section 333.

H. Other rulings.

(i) *Lava v. Emperor*, 13 N. L. R. 87.

In a case of a conviction under Section 353 it was held (1) where a Court has jurisdiction to order delivery of possession, the mere fact that it purports to do so under the authority of a repealed act, will not take away its jurisdiction nor deprive the process-server of the protection which the law gives to a public servant acting under the orders of a Court of competent jurisdiction; (2) that the person convicted cannot claim exoneration on the ground that the process-server whom he assaulted had no badge and was not attired in the livery which is ordinarily associated with the duty which he claimed to be discharging, if in fact the accused knew him to be a public servant acting in the execution of his duty as such servant; (3) that such person cannot claim exoneration from liability on the ground that the Court has passed a wrong order, if in fact the Court had jurisdiction to pass such order.

(ii) *Mir Shah Nawaz Khan v. Crown*, 8 S. L. R. 1 = 16 Cr. L. J. 15 = 26 Ind. Cas. 319 (1915).

During the course of a search by an officer-in-charge of a police station, at a place beyond the limits of his station, a riot took place and the policemen were beaten. It was held that in the absence of a written order of the officer-in-charge of the police station within the limits of which the search took place, the search was illegal (Sections 165 and 166, Cr. P. C.). It was also held that in spite of the illegal search the police would still be justified in arresting suspected persons under Section 54, Cr. P. C., or attaching suspected property under Section 550. The accused could not be found guilty under Section 332 because the object of the riot was to resist the search, and in making the searches, the police were not acting in discharge of their duties. They were guilty of hurt and rioting as the police were acting in good faith under colour of their office (7 B. H. C. Cr. 50, 18 A. 246).

GENERAL REMARKS.

Sections 183, 184 and 186 are also allied to these sections now under consideration.

Those sections deal with the resistance to the taking of property by the lawful authority of a public servant, the obstructing a sale of property offered for sale by a public servant, and (Section 186) voluntarily obstructing any public servant in the discharge of his public function. The offence under Section 186 is punishable with imprisonment of either description which may extend to three months or with fine which may extend to five hundred rupees or with both. If the obstruction amounts to assault or the use of criminal force, then the offence falls under Section 353, and if hurt or grievous hurt is caused the Sections 332 and 333 come into operation.

All these sections must be read with Section 99 (1) which enacts that there is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done by a public servant acting in good faith under colour of his office, though that act may not be strictly justifiable by law. Stress has been laid by the High Court of Allahabad in Queen-Empress *v.* Dalip, 18 A. 246, and Emperor *v.* Mukhtar Ahmed, 37 A. 353, on the distinction between the words "acting in discharge or in execution of his duty," and the phrase "acting under colour of his office." The former words mean that an officer has a duty to discharge and is discharging it at the particular time; and a finding that a public servant was resisted at a time when he was acting in good faith under colour of his office is not the same thing as a finding that he was acting in discharge of his duties as a public servant.

In Queen-Empress *v.* Dalip a warrant had been issued in a non-cognizable case and had been given to a particular constable for execution; but subsequently some other constables were ordered orally to proceed to another village and arrest the man. As these constables were not acting under an order in writing made under Section 56, Cr. P. C., it was held that they were not in discharge of their duties at the time when they were assaulted, and therefore there could be no conviction under Section 332; but as they were acting in good faith under colour of their office, the accused had no right of private defence and was guilty under Sections 147 and 323.

In Emperor *v.* Mukthar Ahmed an Excise Inspector made an irregular search, and for similar reasons it was held that the accused were not guilty under Section 332 but only under Section 323.

This distinction does not appear to have been observed by the Madras High Court in Queen-Empress *v.* Pukot Kota, 19 M. 349, where a Sub-Inspector of Salt searched a house without a warrant which he was not justified in doing. It was held therein that the accused could not set up the illegality of the proceeding as a justification of their obstruction, as it was not shown that the officers were acting otherwise than in good faith and without malice, and convictions under Sections 147 and 353 were restored.

The cases will now be classified under certain headings.

(a) Madho Sonar *v.* Emperor, 13 A. L. J. 691, and Mir Shah Niwaz Khan *v.* Crown, 8 S. L. R. 1.

1. Searches: (a)
beyond limits of
jurisdiction

These were cases of irregular searches by a Sub-Inspector at a place beyond the limits of his police station. In the former case it was held that resistance to such a search was not punishable under Section 353 and in the latter case (following Queen-Empress *v.* Dalip 18 A. 246) it was held that there could be a conviction under 147 and 323 but not under 332.

(b) Jagannath Mandhata *v.* Queen-Empress, 24 C. 324, which was the case of an irregular search by (b) by Excise Officers. an Excise Officer; it was held that there was no offence under Section 353.

See also 37 A. 353, referred to above.

(c) by Police. (c) Parasurami Asari, 9 M. L. T. 168.

Venkatappa Naidu *v.* King-Emperor, 17 M. L. J. 323.

Ali *v.* Emperor, 24 P. R., 1880. Bhim Singh *v.* Emperor, 17 A. L. J. 115. Nirmal Singh *v.* Emperor, 42 A. 67.

The first three are cases concerning searches by constables. In the first case a Head Constable searched the house under orders of the Sub-Inspector; it was held that as the Head Constable in conducting the search was obeying the order of his superior officer, the accused was guilty under Section 353 and that Section 165 (3) did not apply.

In the second case an Inspector, acting under Section 165, sat himself outside the house and sent a constable into the house to conduct the search. It was held that the Inspector should have personally conducted the search, and he was not justified in sitting outside and directing a subordinate to search, without giving him a written order specifying the articles to be searched for; and therefore the accused could not be convicted under Section 353 for pushing the constable out after demanding to be shown a list of the articles that were being searched for.

In the Punjab case it was held that a constable deputed to make an enquiry was authorised to make a search of a house.

In Bhim Singh *v.* Empress, 17 A. L. J. 115, it was held that a search of the house of a suspect by a Police Inspector was legal, and an assault on him was punishable under Section 353.

In Nirmal Singh's case it was held that a conviction under Section 332 could not stand where the police officer had failed to secure two witnesses to the search.

(d) Sharaf Khan *v.* Emperor, 114 P. L. R., 1903.

(d) Under Arms
Act.

A search at night is not illegal, and a search for arms is not restricted to the procedure laid down in Section 25 of the Arms Act, which does not override Section 165, Cr. P. C.

(2) Gurameeah *v.* King-Emperor, 16 C. W. N. 336.

2. Warrants
under section 100.

Gora Mian *v.* Abdul Majid, 39 C. 403.

Emperor *v.* Gaman, 16 P. R., 1913.

These were cases about warrants under Section 100, Cr. P. C. In the Calcutta cases it was held that as there was no special form for warrants under Section 100 they were issued on Section 98 forms with necessary modifications and such warrants were regular. In the Punjab case the warrant was irregularly addressed, and it was held that the conviction should be under Sections 147 and 323 but not under 225 B. and 332.

(3) Queen-Empress v. Janki Prasad, 8 A. 293.

Attar Singh v. Crown, 9 P. R. 1918.

3. Irregularities
in warrants.

Jagpat Koeri v. King-Emperor, 2 Pat. L. J.
487. Khidir Bux v. Emperor, 3 Pat. L. J.

636.

These cases concern irregularities in the warrant itself. In the Allahabad case the warrant was initialled only, and it was held that, notwithstanding this irregularity, it was the duty of the officer to execute the warrant and assault on him was punishable under Section 353. In the first Patna case the warrant was signed by the wrong Magistrate and therefore invalid, and also it was executed after the accused has surrendered himself and been released on his own recognizance. It was held that the convictions under Section 353 were bad. In the second Patna case it was held that it is not an offence to resist the execution of an attachment warrant not sealed with the seal of the Court.

In the Punjab case a warrant was issued for the arrest of a woman under Section 498 erroneously charging the woman herself with an offence under that section. It was held that Sections 332 and 225 were inapplicable, but that the accused could be convicted under Section 147.

(4) Shayana Churu Majumdar, 16 C. W. N. 549.

4. Warrant with
bail, bail not de-
manded.

In this case a warrant with bail was issued, but the arrest was made without bail being demanded; it was held that the persons who assaulted the constable committed no offence.

(5) Chundar Coomar Sen v. Queen-Empress, 3 C. W. N. 605.

5. Absence of
warrant.

Tafazzul Ahmed v. Queen-Empress, 26 C. 630.

There can be no conviction in the absence of the warrant or of secondary evidence to prove its contents. But if it is proved that the accused themselves tore up the warrant, it may be presumed that the warrants were regular (16 C. W. N. 336; 39 C. 403).

6. Arrests with-
out warrant.

(6) (a) Queen-Empress x. Dalip, 18 A.

246.

(a) Non-cogniz-
able by police,

In re Perumalu, 1 Weir 344,

In re Latchmana, 1 Weir 343, *Abdool Karim v. Emperor*, 4 C. L. J. 92.

A Police officer has no power to arrest in a non-cognizable case without a warrant, and resistance to such arrest is not punishable, even though the constable was acting under the general orders of a Magistrate (as in 1 Weir 344), or a warrant had been issued but had been executed against other persons (as in the Calcutta case).

(b) *Emperor v. Gopal Singh*, 36 A. 6.

(b) Cognizable offences by police. Ratna Mudali *v. King-Emperor*, 40 M. 1028. *In re Charn Ch. Majumdar*, 20 C. W. N. 1233 cited under 40 M. 1028.

Crown v. Yusaf Alla Ditta, 18 P. R. 1910.

A Police officer under Section 54 has power to arrest without warrant a person whom he has reason to believe has committed a cognizable offence. If he knows that a warrant has been issued, though it may not have been entrusted to him, this will amount to credible information (see 40 M. 1028; 36 A. 6); but the reasonable suspicion and credible information must be based upon definite facts which the police officer must consider for himself (20 C. W. N. 1233).

(c) *Jafar v. the Emperor*, 14 A. L. J. 789.

(c) Arrests by Chaukidars. *Bolai De v. Emperor*, 35 C. 361.

In the Allahabad case it was held that the Chaukidars were not members of the police force and had no authority to arrest on suspicion as the Act under which they had been appointed had been repealed; and in the Calcutta case it was held that under the Bengal Act VI of 1870 a Duffadar was not empowered to arrest a thief, if the theft had not been committed in his presence.

(7) *In re Rakmaji*, 9 B. 558.

(7) Impressment of transport. *Emperor v. Amir Khan*, 183 P. L. R. 1913.

Asa v. Crown, 38 P. W. R. 1913.

In the Bombay and second Punjab case it was held that an assault on a person who had been ordered to impress transport is not an offence as the order was *ab initio* illegal and *ultra vires*. A similar finding was given in *Pershadi Das v. Baljit*

Singh, 14 Cr. L. J. 409 = 20 Ind. Cas. 233, where certain Tahsil peons forcibly seized for military purposes a bullock cart not let on hire.

The contrary was held in the first Punjab case, where it was held that an assault made on a public servant acting in obedience to the orders of his superiors is punishable under Section 353, the question whether those orders were right or wrong in the case being immaterial.

It seems impossible to reconcile the two Punjab ruling Obeying an un- and Asa *v.* Crown is in accordance with the authorised order. Bombay ruling, and appears to be the more correct of the two. It is in consonance with the theory that a person cannot be said to be discharging a public function, if he is obeying an order which is illegal and *ultra vires*. This theory was followed in Queen-Empress *v.* Tulsi Ram, 13 B. 168 and Emperor *v.* Radhe Lal, 29 A. 272, in both of which cases the Collector had issued unauthorised orders to subordinates.

(8) Emperor *v.* Diwan Singh, 244 A. W. N. 1885.

(8) Civil warrants and warrants to distrain property. Emperor *v.* Narbadeshwar, 27 A. 491.

Preo Lal Mukerjee *v.* King-Emperor, 18 C. W. N. 548.

Rajani Kanto Pal *v.* Emperor, 5 C. W. N. 843.

Abinash Chandra *v.* Ananda Chandra, 31 C. 424.

Queen-Empress *v.* Poomalai Udayam, 21 M. 296.

Queen-Empress *v.* Tiruchittambala, 21 M. 78.

Mohini Mohan Banerji *v.* King-Emperor, I Pat. L. J. 550.

Sheikh Nasur *v.* Emperor, 37 C. 122.

Subed Ali *v.* King-Emperor, 40 C. 849 (see below).

Lava *v.* Emperor, 13 N. L. R. 87.

A trifling irregularity such as an omission by a Tabsildar to make an endorsement (244 A. W. N. 1885); or omission to comply with the provisions of Section 82, Civil P. C. (Order 5, Rules 19 and 20) (27 A. 491); or a trifling omission in the previous demand for a tax (21 M. 296), is immaterial. But the execution of a warrant after the expiry of the date given on a warrant (31

C. 424) or of a warrant which was absolutely blank in point of time (1 Pat. L. J. 550; 37 C. 122) is not valid and resistance to the execution of such a warrant would not be punishable under Section 353.

When a warrant is addressed to a bailiff and is executed by the Nazir, such execution is not lawful (1 Pat. L. J. 550); so also when a warrant was addressed to a Naib Nazir under Section 45 of the Bengal Chauki ari Act it was held that only that person who is named in the warrant as charged with execution can lawfully execute it (37 C. 122).

In *Subed Ali v. King-Emperor* (40 C. 849) a warrant issued by a Civil Court was addressed "to the bailiff" and the Nazir of the Court endorsed it to a particular peon. It was held that the fact that the warrant was addressed to the bailiff shows that it is the person who actually made the seizure who is authorised by it, namely the peon, who has derived his authority from the Court and not from the Nazir who endorsed it, and the execution by the peon was lawful. "The term 'bailiff' should not be confined to the Nazir. Order XXI, Rule 25, C. P. C., shows that the warrant is referred to the officer entrusted with the execution of the process and it is clear from the terms of that section that that officer is not the Nazir but it is the peon."

The person executing the warrant must, if the person against whom it is issued wishes to see it, show him the warrant (5 C. W. N. 843; 37 C. 122).

If an officer is legally authorised to make an attachment, the fact that he may erroneously seize wrong goods would not justify resistance or assault (21 M. 78); nor can such action be justified on the ground that the Court issued a wrong order if the Court had jurisdiction to pass such order; nor on the ground the warrant purported to issue under a repealed act if the issue of the warrant was legal; nor on the ground that the peon was not wearing his livery or badge, if the person knew him to be a public servant acting in discharge of his duty as such public servant (13 N. L. R. 87).

(9) *Emperor v. Bahal*, 28 A. 481.

Vaccinators.

Mangobind Muchi v. Emperor, 3 C. W. N. 627.

In re Bozagellaya, 19 M. L. J. 238.

In re Pethan Kovan, 1 Weir 345.

Where vaccination is not compulsory, it is no offence to resist or mildly assault a vaccinator who attempts forcibly to vaccinate a child against the will of the parents.

(10) Meharban Singh *v.* Emperor, 9 Ind. Cas. 669 (All.)

Unauthorised action of officer. Doraswamy Pillay *v.* Emperor, 27 M. 52.
Chajju Mal *v.* Emperor, 76 P. L. R. 1903.

Crown *v.* Alla Bakhsh, 105 P. L. R. 1904.

Lilla Singh *v.* Queen-Empress, 22 C. 686 (see below). The first case was of a *mulguzar* holding an enquiry which was not one of his legitimate duties; in the Madras case a constable entered on the premises of a suspicious character and knocked on the door to ascertain if he was there; the first Punjab case dealt with Railway Police acting without instructions from the railway officials; in the other Punjab case an Excise chaprassi, without authorisation, entered a house to see if *chandu* was being manufactured. In the Allahabad case a constable attempted to enforce an expired order about possession of *lathis*. In all these cases it was held that the accused were justified in inflicting slight harm or committing a trivial assault.

In the Calcutta case the conviction was under Section 186. It was held that the public functions contemplated by Section 186 mean legal or legitimately authorised public functions, and they cannot be taken to cover any act which a public functionary might choose to take upon himself to perform. The case dealt with the function of a *patwari* arising under the Estate Partition Act (Bengal Act XIII of 1876).

(11) Queen-Empress *v.* Ross, 22 B. 746.

Authorised actions. Emperor *v.* Thave Issaji, 13 Bom. L. R. 635.
In re Mahomad Yakub, 7 M. L. T. 386.

Nga Nan Da *v.* Emperor, 3 U. B. R. (1919) 176.

In the first case a Police Inspector entered the enclosure at the Poona race course; in the second a Sub-Inspector of Excise searched a man for cocaine, and in the Madras case a constable was ordered to watch a man. In the first two cases the convictions were under Section 353, and in the third under Section 332. The fourth case deals with the arrest of a man in illegal possession of opium.

(12) Hardit Singh *v.* Emperor, 161 P. L. R. 1911.

Officers acting as private individuals. These sections have no application to a case where public servants are acting as private individuals, e. g., where canal officials attempt to rescue their private cattle.

CHAPTER VII.

RIOTING.

141. An assembly of five or more persons is designated an unlawful assembly, if the common object of the persons composing that assembly is:—

1st. To overawe by criminal force, or show of criminal force, the Legislative or Executive Government of India, or the Government of any Presidency, or any Lieutenant-Governor or any public servant in the exercise of the lawful power of such public servant; or

2nd. To resist the execution of any law or any legal process; or

3rd. To commit any mischief or criminal trespass, or other offence; or

4th. By means of criminal force, or show of criminal force, to any person, to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water, or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or

5th. By means of criminal force or show of criminal force to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

Explanation.—An assembly which was not unlawful when it assembled may subsequently become an unlawful assembly.

142. Whoever, being aware of the facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly.

146. Whenever force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting.

147. Whoever is guilty of rioting shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both.

148. Whoever is guilty of rioting, being armed with a deadly weapon, or with anything which, used as a weapon of offence, is likely to cause death, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

149. If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.

152. Whoever assaults, or threatens to assault, or obstructs, or attempts to obstruct, any public servant in the discharge of his duty as such public servant in endeavouring to disperse an unlawful assembly, or to suppress a riot or affray, or uses, or threatens to use, criminal force to such public servant shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

153. Whoever malignantly, or wantonly, by doing anything which is illegal, gives provocation to any person, intending, or knowing it to be likely that such provocation will cause the offence of rioting to be committed, shall, if the offence of rioting be committed in consequence of such provocation, be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both; and if the offence of rioting be not committed, with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

154. Whenever any unlawful assembly or riot takes place, the owner or occupier of the land upon which such unlawful assembly is held, or such riot is committed, and any person having, or claiming, an interest in such land, shall be punishable with fine not exceeding one thousand rupees, if he, or his agent, or manager, knowing that such offence is being or has been committed, or having reason to believe it is likely to be committed, do not give the earliest notice thereof in his or their power to the principal officer at the nearest Police station, and do not, in the case of his or their having reason to believe that it was about to be committed use all lawful

means in his or their power to prevent it, and, in the event of its taking place, do not use all lawful means in his or their power to disperse or suppress the riot or unlawful assembly.

155. Wherever a riot is committed for the benefit, or on behalf, of any person who is the owner or occupier of any land respecting which such riot takes place, or who claims any interest in such land, or in the subject of any dispute which gave rise to the riot, or who has accepted or derived any benefit therefrom, such person shall be punishable with fine, if he, or his agent, or manager, having reason to believe that such riot was likely to be committed or that the unlawful assembly by which such riot was committed was likely to be held, shall not respectively use all lawful means in his or their power to prevent such assembly or riot from taking place, and for suppressing and dispersing the same.

156. Wherever a riot is committed for the benefit, etc.....(as in Section 155).....or derived any benefit therefrom, the agent or manager of such person shall be punishable with fine, if such agent, or manager, having reason to believe that such riot was likely to be committed, or that the unlawful assembly by which such riot was committed was likely to be held, shall not use all lawful means in his power to prevent such riot or assembly from taking place, and for suppressing and dispersing the same.

Introductory Remarks.

Before proceeding to cite the cases under these sections, I will quote some extracts from the judgment of Mr. Justice Plowden in *Madat Khan v. Empress*, 61 P. R. 1887, wherein he discusses and explains Section 149:—

"The specific object of Section 149 is to render the guilt of an offence committed by one (or more) of several persons imputable, under the stated conditions, to a person who has not committed that offence, or been actually concerned in, or abetted the commission of that offence. It also enables the actual offender to be punished, notwithstanding that he is not known to be the actual offender. There are closely allied but distinct provisions in Section 34 to Section 38, and the sections defining and punishing abetment. The former group of sections deals with a criminal act done by several persons jointly and the responsibility of each person concerned in its

commission. The sections as to abetment deal with the responsibilities of abettors, both for the offence abetted and, under stated circumstances, for other offences committed by the person abetted. It is a reasonable presumption that the special provision in Section 149, dealing with a cognate matter, should be in harmony with the general provisions of the Code to which it is supplementary, and I think it will be found that it is so."

The next step is to ascertain the meaning of the terms employed in Section 149.

"Unlawful assembly" is defined in Section 141. The quality of unlawfulness attaches to an assembly if the common object is of any one or more of the descriptions contained in the 5 clauses of that section. "Member of an unlawful assembly" is defined in Section 142.

An examination of Section 141 will show that every common object, as there defined, involves the commission of an offence either as the common end, or as a means to the common end.

In clause 3 the common object involves contemplation of the commission of some specific offence as an end. In clauses 1, 4 and 5, the common object involves contemplation of the commission of the offence of using criminal force, or assault, as a means to the common end. In clause 2 the common object is to resist the execution of any law or of any legal process. This last common object necessarily involves contemplation of some offence as a means to the common end, if the resistance offered be not itself, as it may be, a specific offence (e.g., Sections 173, 183, and 186, I. P. C.).

It follows that an unlawful assembly as defined in the Code, is an assembly of persons each and all of whom contemplate either the commission of some specific offence as their common end, or the commission of some offence as the means to their common end,—such offence, in cases not provided for in clause 2, being the use or show of criminal force and in cases falling under clause 2, this or some other offence.

It may be explained here that a person who contemplates the commission of a specific offence, whether as an end or as a means, necessarily contemplates an attempt to commit that offence, and also the commission of any minor offence involved in the greater offence, and an attempt to commit any such minor offence.....It seems unquestionable that the Legislature, when it uses the expression "common object" in

Section 149 and elsewhere, means "common object" formulated in one of the manners described in Section 141 (see Section 7), and that it may be reasonably presumed that the Legislature expects a Court interpreting or applying the Code, in respect to members of an unlawful assembly, to express the ascertained common object of the assembly in terms of one of the numerous formula supplied in Section 141.....

The definition of an imputable offence, the offender and the accused being members of the same assembly at the time of its commission, is a definition comprising two branches, that is (1) an offence committed in prosecution of the common object of the assembly; or (2) an offence such as the members of that assembly knew to be likely to be committed in prosecution of the common object. It is not, I think permissible, unless the section cannot otherwise be sensibly construed, to ignore the word "or" or to construe it as "and" as proposed by Jackson, J., in Sabed Ali's case (11 B. L. R. 347). The section can, as that case shows, be construed treating "or" as a disjunctive, though in none of the judgments does any Judge seem to have succeeded in putting such a construction on the section that an offence falling within the first branch could not fall within the second branch of the definition.

But it seems to me that the section is capable of being so construed that no offence can, properly speaking, fall within both branches; that the first branch refers to and includes all offences of which, when committed, it can be said that their commission was necessarily involved in the execution according to the proposed means (if any) of the ascertained common object expressed in terms of Section 141; and that the second branch refers to and includes some but not all of the offences, which, not being necessary to be committed in the sense just stated, may nevertheless be committed by a person engaged in prosecuting the common object, and acting with that purpose; namely, those offences of which, when committed, it can be said that they are such as were to the knowledge of the members of the assembly likely to be committed.....

The words "offence committed by a member of an unlawful assembly in prosecution of the common object" appear to be open to only three interpretations, *viz.* :—

(1) An offence committed by a member of the unlawful assembly when engaged in prosecuting the common object without regard to the circumstance whether such offence is committed by him with the purpose of executing that object.

(2) An offence committed by such member when engaged in prosecuting the common object, the offender acting with the purpose of executing that object, without regard to the circumstance whether the commission of the offence executes or tends to execute that object.

(3) An offence committed by such member when engaged in prosecuting the common object, the offender acting with the purpose of executing that object, and the commission of the offence executing or tending to execute that object.

On the first view it can hardly be said that the offence is committed in prosecution of the common object, when the common object is not prosecuted thereby, even as regards the intent of the offender.....A, an honest man, and B, a pickpocket, are members of the same unlawful assembly, the common object being by show of criminal force to overawe a public officer. While both are thus engaged B picks A's pocket. It would be almost absurd to say that this offence of theft was committed by B "in prosecution of the common object" and was therefore imputable to A, whose pocket was picked.

I think therefore that no offence can be said to be committed in prosecution of the common object unless it is at least committed by the offender with the purpose of attaining the common object.

An offence committed by a member of an unlawful assembly, acting with the purpose just mentioned, may, I think, properly be said to be committed in prosecution of the common object, whether or not the commission of the offence executes or tends to execute the common object. For in this case the object is prosecuted as regards the intention or purpose of the offender, even though it be not prosecuted in the result of his actions.

The difficulty in accepting this, the second view, as the true interpretation lies in the difficulty of opposing it to the alternative branch of the definition of imputable offences. The opposed branches would then be "an offence committed by such member, acting with the purpose of executing the common object, or an offence committed by such member not acting with such purpose, but such as the members of the assembly knew to be likely to be committed by a member acting with that purpose."

The first branch of the definition interpreted as above suggested would lead to serious injustice.

Suppose, for instance, a crowd seeking admission into a building on some great occasion, and an entrance guarded by a single policeman who is the sole obstacle to a free entrance. Suppose that six members of the crowd nearest to the policeman are connected by the ascertained common object of entering the building by this entrance by use of criminal force to the policeman, that is, by forcing him out of the way. One of the six suddenly produces a revolver and shoots the policeman dead, thereby committing the offence of murder. On the interpretation under consideration (as also under the first interpretation) the other five members of the unlawful assembly are all guilty of murder, and must be hanged or transported for life, notwithstanding that it be proved that they were all strangers to the 6th member, and did not know that he had a pistol and that the act was so sudden that no one could prevent it.

There is no similar difficulty attending the third suggested interpretation. Here the common object is prosecuted both in the intention or purpose of the doer, and in the result of his action. The opposition between the two branches of the definition is also complete, and no offence can fall under both branches.

We should have in the first branch "an offence committed by a member of an unlawful assembly engaged in prosecuting the common object, and acting with the purpose of executing such object, the commission of which offence executed or tended to execute the common object." In the second branch we should have "an offence committed by such member, acting with such purpose, the commission of which did not execute or tend to execute the common object, but which offence was such as was likely, to the knowledge of the members of the assembly, to be committed by a person so engaged, acting with such purpose."

On this interpretation the test whether an offence is "committed in prosecution of the common object" is, whether the common object is prosecuted in fact as well as in the intention of the doer. When that is the case, every person who is engaged in prosecuting the same object may well be held guilty of an offence which fulfils or tends to fulfil the object which he is himself engaged in prosecuting. It must however

be clearly understood that no offence executes or tends to execute the common object, unless the commission of that offence is involved in the common object.

When this is not the case, the offence committed, not being committed in prosecution of the common object in its strict sense, may yet fall under the second branch, and, if it be such as the members of the assembly knew to be likely to be committed by a person engaged in prosecuting the common object and acting with the purpose of executing it, may fairly be imputed to the other members of the assembly.

Thus in the illustration last given, upon the interpretation now under notice, the offence of murder is clearly not "committed in prosecution of the common object." The ascertained common object is to clear the way, by means of criminal force, of the policeman. The means actually employed, though used with the intention of clearing the way and so far effecting the object, are not the means involved in the common object, as the offence of murder is not involved in the offence of using criminal force. The offence of murder would not therefore be imputable to any other members of the assembly under the first branch. It would be imputable under the second branch only if it was known to the members of the assembly that murder was likely to be committed by a person engaged in prosecuting the common object, and acting with the purpose of executing it. Having that knowledge, they would be justly responsible for the act of murder, but not otherwise.

On this third interpretation the full text of the definition would run thus:—

"If an offence committed by any member of an unlawful assembly is committed in prosecution of the common object, or, not being committed in prosecution of the common object, is such an offence as the members of the assembly knew to be likely to be committed in prosecution of that object." This is a form of speech which seems quite intelligible if the expression "in prosecution of the common object" be understood in the special and narrow but legitimate sense above given to it.

The second branch of the definition in Section 149 clearly indicates that offences not likely to be committed in prosecuting the common object, and even offences likely to be committed but not known to be likely, are to be excluded from imputable offences. This being so, the natural inference from the terms of the second branch seems to be, that only those

offences are to be imputable under the first branch, the commission of which was necessarily contemplated by the members of the assembly by reason of their entertaining the common object, that is to say, offences which the execution of the common object by the means (if any) proposed necessarily involved. This would include attempts to commit any offence involved in the common object, either as an end or a means to the end, and would include, when the common object involved as an end or means to an end an offence including one or more minor offences, the commission of any such minor offence, and attempts to commit any such minor offence.

Thus suppose the ascertained object of an assembly to be to cause grievous hurt to A and his supporters, the offence of attempt to cause grievous hurt, of causing hurt or attempting to cause hurt, of using criminal force or attempting to use criminal force to A or any of his supporters, if committed, would all be offences imputable under the first branch, but not culpable homicide or murder, though these latter offences, if committed, might be imputable under the second branch.....

The second branch of the definition of imputable offences calls for further observation. The question under the first branch practically is "did execution of the common object by the means (if any) proposed involve commission of the offence actually committed?"

The question under the second branch is not "did the members of the assembly know that the particular offence actually committed was likely to be committed" nor "did the offenders know that an offence of the same kind (that is the same *genus*) with the offence committed was likely to be committed," but "did the members know that an offence of the same kind, that is of the same *species*, with the offence committed was likely to be committed?" The distinction is of very considerable importance.

For instance suppose the common object of an assembly to be, as in the last illustration, to cause grievous hurt to A and his supporters, and B is killed by an act amounting to murder, the question is not whether the members of an assembly knew it to be likely that B would be murdered, nor whether they knew it to be likely that *culpable homicide* (the genus of which murder is a species) would be committed, but whether they knew it to be likely that *murder* would be committed. This is the view taken by Phear and Pontifex, JJ., in the case of Sabid Ali (11 B. L. R. 353, 357).

Lastly the importance of the expression "knew to be likely to be committed" must be prominently noticed. The expression imports at least an expectation founded upon facts known to all the members of the assembly, that an offence of a particular kind committed would be committed; something more than a speculation that such an offence might happen to be committed (see Pontifex, J., page 354).

The Code was specially framed with regard to the circumstances of this country, and the Legislature must be presumed to have known that riots on a large scale, sometimes accompanied with loss of life, were not unfrequent. It is antecedently improbable that a Legislature, which enacted Section 460 of the Code, intended that all persons engaged in a riot should be punishable with death for an act of murder in which they were not individually concerned, otherwise than upon strict proof that they knew that murder was likely to be committed. But bearing in mind the definition of murder and the extreme difficulty, as pointed out by Phear, J., in Sabid Ali's case (page 358), of proving that an assembly of persons regarded collectively knew that murder as distinct from culpable homicide was likely to be committed, the provision in Section 149 becomes intelligible. In Section 460 the Legislature has used the expression "voluntarily causing death" (cf. Section 30, I. P. C.). This expression renders it unnecessary to determine whether the act of homicide amounts even to culpable homicide, still less whether it amounts to murder, while the punishment awardable is that prescribed for the highest degree of culpable homicide not amounting to murder. In Section 149 it appears that, to render a person liable under the second branch of the definition to the punishment for murder, it must be proved, not merely that he had reason to believe or even had knowledge that death was likely to be caused, but that he and the other members had knowledge that death was likely to be caused under circumstances constituting the act of homicide, culpable homicide of the highest degree, that is amounting to murder, a knowledge which, if it be capable of proof, is certainly extremely difficult of proof.

The following is an extract from *Jahruddin v. Queen-Empress*, 22 C. 306.

"We do not think that either of the two cases (*Queen v. Sabed Ali*; and *Hari Singh v. Empress*, 3 C. L. R. 40) lays down any hard and fast rule applicable to all cases. Each of the two cases was decided with reference to its own facts, and every case depending upon the application of Section 149 must be so decided. In dealing with such cases while, on the one hand, it is necessary for the protection of accused persons that they should not, merely by reason of their association with others as members of an unlawful assembly, be held criminally liable for offences committed by their associates, which they themselves never intended nor knew to be likely to be committed; on the other hand it is equally necessary for the protection of peace that members of an unlawful assembly should not lightly be let off from suffering the penalties for offences for which, though committed by others, the law has made them punishable by reason of their association with the actual offenders with one common object. We may add that members of an unlawful assembly may have a community of object only up to a certain point, beyond which they may differ in their objects, and that the knowledge possessed by each member of what is likely to be committed in prosecution of their common object will vary, not only according to the information at his command, but also according to the extent to which he shares the community of object, and, as a consequence of this, the effect of Section 149 may be different on different members of the same unlawful assembly."

A. Bombay.

(i) *Reg. v. Ganu, Rat. Un. Cr. C. 99 (1875).*

Actual participation in violence is not necessary to convict a person of rioting. Those who encourage by signs, symbols, or shouts, the unlawful object of the assembly are also rioters.

(ii) *Queen-Empress v. Narsang Pathabhai, 14 B. 441 (1890).*

The third clause of Section 99 must be read with the first clause of 105. The right of private defence of property commences when a reasonable apprehension of danger to the property commences. Before such an apprehension commences, the owner of the property is not called upon to apply for protection to the public authorities. The apprehension which justifies a recourse to the authorities ought to be based on some information of a definite kind as to the time and place of the danger actually threatened.

Accused No. 1 received information one evening that the complainants intended to go on his land on the following day and uproot the seed sown on it. About 3 a.m. he was informed that the complainants had entered on his land and were ploughing up the seed. He at once proceeded to the spot, followed by the other accused, and remonstrated with the complainants. The complainants, without paying any attention to his remonstrances, commenced an attack on the accused. In the fight which ensued, both sides received serious injuries, and one of the complainant's party was killed. It was held that the complainants being the aggressors, the accused had the right of private defence both of person and property, and that in the exercise of this right, they did not inflict more harm than was necessary.

It was also held that the accused were not bound to act on the information received on the previous evening, and seek the protection of the public authorities, as they had no reason to apprehend a night attack on their property. (Followed:—*Birjoo Singh v. Khub Lall, 19 Cal. W. R. Cr. 66.*

In re Shunker Singh, 23 Cal. W. R. Cr. 25.

Queen v. Sachee, 7 Cal. W. R. Cr. 112.

Ganouri Lal Das v. Queen-Empress (16 C. 206) was distinguished on facts. Followed in *Pachkauri v. Queen-Empress, 24 C. 686,*

(iii) Queen-Empress v. Bana Punja, 17 B. 260 (F. B.) (1892).

When a prisoner is convicted of rioting and hurt, and conviction for hurt depends on the application of Section 149, it is not illegal to pass two sentences, one for riot and one for hurt, provided the total punishment does not exceed the maximum which the Court might pass for any one of those offences. When however the accused is guilty of rioting, and is also found to have himself caused the hurt he may be punished both for rioting and for hurt. In such a case the total punishment may legally exceed the maximum which the Court might pass for any one offence (followed in 8 P. R. 1895).

(iv) Queen-Empress v. Kahanji, 18 B. 758 (1893).

The mere chance of a provocation by an illegal act is sufficient to justify the conviction under Section 153. The section moreover requires that the provocation given by the commission of an illegal act must be given malignantly and wantonly.

“Malignantly” implies a sort of general malice.

(v) Emperor v. Krishna Rao Narayan Rao, 5 Bom. L. R. 1023 (1903).

Section 149 is not intended to subject a member of an unlawful assembly to punishment for every offence which is committed by one of its members during the time they are engaged in the prosecution of the common object. In order to bring a case within the section the act must be done with a view to accomplish the common object of the unlawful assembly, or it must be proved that the offence was one which the accused knew would be likely to be committed in prosecution of the common object.

(vi) Emperor v. Gulam Hoosain, 11 Bom. L. R. 849 = 3 Ind. Cas. 958 = 10 Cr. L. J. 427 (1909).

Clause 4 to Section 141 is meant to prevent the resort to force in vindication of supposed rights. It makes a distinction between an admitted claim or an ascertained right and a disputed claim.

(vii) Emperor v. Bechun Anop, 40 B. 105 (1915).

The right of private defence cannot be successfully invoked by men who voluntarily and deliberately engage in fighting

with their enemies for the sake of fighting, as opposed to the case where men are reluctantly forced to use violence in order to protect themselves from violence opposed to them (followed; 35 C. 368, at page 376).

(viii) Emperor v. Hari Bijal, 17 Bom. L. R. 906 3 Bom. Cr. C. 118 (1917).

A gang of persons, making preparations to commit a dacoity, was discovered in the limits of a certain village ; and was pursued by villagers who seized and arrested the two accused who were members of the gang. Shortly afterwards a dacoit at large fired a gun and killed one of the villagers. The accused were tried for murder under Section 302 read with Sections 149 and 34.

It was held that the accused were not guilty of murder, for, the separation of the two accused from the gang having been prior to the murder, there could be no common object and neither Section 149 or Section 34 applied. In so far as the common object of the unlawful assembly had been originally to commit dacoity, that object at the critical time must be taken to have been abandoned ; and the two accused being by force of circumstances separated from the gang, the subsequent murder committed by one, who still remained a member of the gang, ought to be regarded in fact as an independent and isolated act for which the two accused could not be held liable.

B. Allahabad.

(i) Empress v. Bandho Singh, 28 A. W. N. 1881 :

Empress v. Bahadur Khan, 28 A. W. N. 1881 :

When two factions were charged with rioting, each faction should be given a separate trial.

(ii) Empress v. Pulandhar, 160 A. W. N. 1882.

Persons composing both parties to a riot cannot be jointly tried for rioting. Each party should be tried separately.

(iii) Empress v. Gattu, 32 A. W. N. 1883.

A fight took place between the two parties ; the prisoners were the aggressors, and used *lathis* ; the deceased received blows at the hands of one or more of the accused ; his spleen, which was not diseased, was ruptured and death was caused. It was found that each of the five accused having at the time been a member of an unlawful assembly was responsible for the death of the accused. It was held that the prisoners should have been convicted both under Section 148 or 149/304, and that the sentences of three months were inadequate.

(iv) Empress v. Ram Partab, 6 A. 121 (1884).

A member of an unlawful assembly, some members of which have caused grievous hurt, cannot be punished for the offence of rioting as well as for the offence of causing grievous hurt. A riot is part of the other offences, the force or violence incident to their commission converting what would otherwise have been a mere unlawful assembly into a riot. (Dissented from in 7 A. 29 and 9 A. 645; approved in 16 C. 442).

(v) Queen-Empress v. Dungar Singh, 7 A. 29 (1885).

The offence of rioting, of voluntarily causing hurt, and of voluntarily causing grievous hurt, each of the two latter offences being committed against a different person, are all distinct offences within the meaning of Section 35. Under 1st part of Section 235 a person accused of rioting and causing hurt may be charged with and tried for each offence at one trial, and under Section 35 a separate sentence may be passed in respect of each. (6 A. 121 dissented from), (followed in 11 C. 349 and 32 P. R. 1885).

(vi) Queen-Empress v. Parshad, 7 A. 414 (1885).

(Per Oldfield and Duthoit, J.J.). The provisions of Section 71, Cr. P. C., have no application to the case inasmuch as the offences of causing grievous hurt and hurt formed no part of the offence of rioting.

(Per Brodhurst, J.). A member of an unlawful assembly, some members of which have caused grievous hurt, can be legally punished for the offence of rioting as well as for the offence of grievous hurt.

(vii) Queen-Empress v. Ram Sarup, 7 A. 757 F. B. (1885).

Three persons were convicted (i) of riot under Section 147 ; (2) of grievous hurt under Section 325.

It was held by three Judges that inasmuch as the evidence on the record shows that the three prisoners had committed individual acts of violence with their own hands, which established distinct offences of causing hurt separate from and independent of the offence of riot, which was already completed, and the fact of the riot was not an essential portion of the evidence necessary to establish their legal responsibility under Section 325, separate sentences under Sections 147 and 325 were not illegal.

One Judge held that the evidence showed that only one of the three persons had caused grievous hurt with his own hands, and that the others could only properly be convicted of that offence under the provisions of Section 149 ; but that the separate sentences passed under Sections 147 and 325 were not illegal. In this case the offence of "unlawful assembly" turned into the offence of rioting by a blow causing grievous hurt ; therefore every member of the unlawful assembly became guilty of the offence of rioting and were liable, for injuries subsequently inflicted (following 7 A. 29).

(viii) Empress v. Sigdar, 96 A. W. N. 1885.

Where the evidence disclosed no common unlawful object among the accused party, but only an intention to devise some means of settling the dispute as to land of which the other party had forcibly taken possession, and the affray that followed was only a result of the aggressiveness of the other party, it was held that there could be no conviction for rioting.

(ix) Empress v. Khushal Singh, 23 A. W. N. 1886.

The offence under Section 153 requires that the offender should do something illegal, by doing which he malignantly or wantonly gives provocation to any person, intending or knowing it to be likely that such provocation will cause the offence of rioting to be committed.

The accused had refused to close a door and put up a *pardah* to hide an image of Bhawani while a Mussalman procession passed by. Held not guilty.

(x) Empress v. Bidhi, 254 A. W. N. 1886.

When the accused were simply defending themselves against the attack made upon them by the opposite party, it was held that they were not guilty of an offence under Section 147.

(xi) Queen-Empress v. Bisheshar, 9 A. 645 (1887).

Section 149 creates no offence, but was intended to make it clear that an accused person whose case falls within its terms cannot put forward the defence that he did not with his own hands commit the offence committed in prosecution of the common object of the unlawful assembly, or such as the members of the assembly knew to be likely to be committed.

In prosecution of the common object of the unlawful assembly M with his own hands caused grievous hurt. M and other members of the assembly, as to whom it did not appear whether or not any of them personally used force or violence, were convicted of rioting under Section 147 and grievous hurt under Section 325, and sentenced to separate terms of imprisonment for each offence. It was held that the riot could not be considered a part of the offence under Section 325; and Section 71 did not apply and separate sentences were legal.

(7 A. 29, 7 A. 757, 7 A. 414 and 12 C. 498 followed; 6 A. 121 dissented from.)

(xii) Queen-Empress v. Payag Singh, 12 A. 550 (1890).

In order to render the owner liable under Section 154, the knowledge of the owner that a riot was about to be committed is immaterial. He is liable for the acts of commission and the acts of omission not only of himself, but of his agent or manager. That his manager took an active part in the riot is sufficient to convict the owner (followed in 28 C. 504).

(xiii) Queen-Empress v. Shamsher Khan, 170 A. W. N. 1896.

Where it was found that the accused did not belong to an unlawful assembly, and that some one among them caused grievous hurt, but it was not known who did so, it was held that Section 149 did not apply, and that all must be acquitted.

(xiv) Queen-Empress v. Prag Dat, 20 A. 459 (1897).

If a body of men go down to meet another body of men evidently intent upon picking a quarrel armed with a loaded

gun, and use it within a short interval of their arrival, it is for them to rebut the inference which at once arises that their intention was by means of criminal force or show of criminal force to enforce their rights or supposed rights. When a body of men are determined to vindicate their rights by unlawful force, and when they engage with men who on the other hand are equally determined to vindicate by unlawful force their rights or supposed rights, no question of self defence arises.

(xv) King-Emperor v. Kaliji, 24 A. 143 (1902).

Party A sowed a crop in a field to the possession of which they were apparently entitled. Party B claiming the field and the crop as theirs entered upon the land and began to cut the crop. Party A having watched B enter upon the land took counsel together, and then proceeded to attack party B, and a fight ensued in which grievous hurt was caused. It was held that it was not open to party A to plead that they were acting in exercise of their rights of private defence of property.

(20 A. 459 followed; 14 B. 441 distinguished on facts.) Reference was made to 24 C. 686, Pachkauri v. Queen-Empress :—“There it was held that where a body of men who were rightfully in possession found it necessary to protect themselves from aggression on the part of the complainant's party, they were justified in taking such precautions as they thought were required, and in so doing they could not be held to be members of an unlawful assembly. The view taken in that case is not in accord with that adopted in the ruling of this Court, and I think I should prefer the latter ruling.”

(xvi) Emperor v. Kadhu Singh, 24 A. 298 (1902).

Of two parties, each of which claimed title to certain trees, one party went to cut down the trees, and went armed with *lathis*, apparently with the intention of resisting anticipated opposition on the part of the other claimants. The other party attempted to stop the cutting of the trees, and a fight ensued. It was held that the first party were guilty of rioting, and, whatever their title to the trees was, they could not claim that they had acted in the exercise of their rights of private defence.

(xvii) Mahomed Ishaq Khan v. King-Emperor, 1 A. L. J. 602.

When a number of persons who were assaulted at a certain place ran away on being attacked by the opposite party, it was held that the former were not guilty of rioting.

(xviii) Emperor v. Husain Bakhsh, 29 A. 569 (1907)

When certain persons taking part in a religious procession gratuitously disobeyed the order of the police concerning the manner in which such procession was to be conducted, with the result that a riot was averted only by bringing armed police upon the scene, it was held that the persons concerned acted, though not malignantly, yet wantonly, within the meaning of Section 153, and were properly convicted under that section.

(xix) Rasul Khan v. Emperor, 13 A. L. J. 470 = 29 Ind. Cas. 91 (1915).

Applicant's cattle were doing considerable damage to the crops belonging to the complainant, who drove them to the cattle pound. While they were on their way to the pound, the accused came armed with *lathis* to rescue the cattle. At the command given by one of them, the others assaulted the deceased and beat him with the result that he died.

It was held that the offence was committed in prosecution of the common object, and each one of the accused was guilty under Section 302.

(xx) Emperor v. Katwaru Rai, 39 A. 623 (1917).

When several persons being on their trial on a charge of rioting, it appears that some of them have also committed the offence of causing simple hurt under Section 323, there is no legal objection to charging such persons under that section and convicting them for such offence as well as for the offence of rioting.

(xxi). Jageshwar Rai v. Emperor, 15 A. L. J. 47 = 18 Cr. L. J. 663 = 40 Ind. Cas. 311 (1917).

One J. R. lawfully obtained possession of certain land, on which he sowed some crops. B. K., in bad faith and dishonestly, with a party of men went upon the land and commenced to cut the crops for the purpose of removing them, or at least damaging them. J. R., on receiving information, went in company with a band of men to the spot to protect his property. A fight ensued in which only very slight damage was done to any body. There was apparently no time to have recourse to the protection of the public authorities.

It was held that the accused were not guilty of rioting.

"The case cannot be compared with Queen-Empress *v.* Prag Dat, 20 A. 459. Further it is not a case in which the opposite party were merely ploughing up the land and preparing it for sowing. In the latter case no damage is being done, and there is ample time to have recourse to the public authorities for the enforcement of their right. In the present case property was being actually cut and damaged. If the applicants had gone to the Police Station and returned with Police help, the damage would have been completed."

(xxii). Abdullah *v.* Emperor, 17 A. L. J. 200 = 49 Ind. Cas. 776 (1919).

No conviction under Section 153 can be had, unless it is proved *inter alia* that the act of the accused was done either malignantly or wantonly.

The accused, a Muhammadan, killed a cow in the village before sunrise. The act was observed by one or two Muhammadans, who sent a report to the Police Station. It was held that there being no evidence of malice or wantonness on the part of the accused, the conviction under Section 153 was bad.

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(i) *In re Kalee Beparee*, 1 C. L. R. 521 (1878).

When both parties are armed and prepared for battle, it does not matter which is the first to attack unless it is shown that either of the parties was acting within the legal limits of the right of private defence (followed in 35 C. 368).

(ii) *Hari Singh v. Empress of India*, 3 C. L. R. 49 (1878).

When a body of men, most of whom carried lethal weapons and one of them a gun, assembled for the purpose of dispossessing another of his field, and one of them fired the gun resulting in the death of one of the other party who was legally defending his property, it was held that all the members of the unlawful assembly were guilty of murder.

(A similar finding was given in *Dewan Singh v. Queen-Empress*, 22 C. 805, wherein the accused were armed with *lathis* and *gurasas*.)

(iii) *In re Radha Nath Chodhry*, 7 C. L. R. 289 (1880).

A non-resident partner or co-sharer cannot be convicted in addition to the resident sharer under Sections 154, 155. When there is no resident sharer, but only an agent or manager, the absentee owner might be held liable under some circumstances.

(iv) *Peary Mohun Sircar v. Empress*, 9 C. 639 (1883).

There was a dispute of long standing between the accused and certain other parties regarding the possession of certain land, and neither of the parties was in undisturbed possession of the land. The accused went to sow the land with indigo accompanied by a body of men armed with *lathis*; they were prepared to use force if necessary, and the *lathials* kept off the opposite party by brandishing the weapons while the land was sowed. It was held that there is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities, and that the accused were rightly convicted of being members of an unlawful assembly under Section 143.

(v) *Brae v. Queen Empress*, 10 C. 338 (1883).

In order to convict the manager of an indigo factory under Section 156, it must be shown by legal evidence (1) that a riot was committed; (2) that the riot, if committed, was committed for the benefit of the accused; (3) that the accused had reason to believe that a riot was likely to be committed.

(vi) Loke Nath Sarkar v. Empress 11 C. 349 (1885).

Separate sentences were given for rioting armed with deadly weapons under Section 148 and also under Section 324/149.

It was held that the several acts with regard to which the prisoners were charged did not fall within the provisions of Section 71 inasmuch as it was not found that the causing of the hurt was the force or violence which alone constituted the rioting ; consequently under Section 235, C. P. C., the several sentences passed were strictly legal.

" If it had been found that the causing of the hurt was the force or violence which alone constituted the rioting, then we should be prepared to hold that the prisoners could not be punished both for causing hurt and rioting. But the facts of the case do not warrant such a finding, for rioting was being committed before the hurts were inflicted on the men wounded. We note that the view of the law which we have taken was adopted by the High Court of Allahabad in the recent case of Queen-Empress v. Dungar Singh (7 A. 29) (overruled in 16 C. 442).

(vii) Ganouri Lal Das v. Queen-Empress, 16 C. 206 (1889).

A party of persons, consisting of some five *pandas* and a number of coolies sufficient for the work to be done, went to a spot on a river flowing through the lands of M for the purpose of either repairing or erecting a *bund* across it to cause the water to flow down a channel to the lands of their master T. The river at the time was about dry and the party did not go armed ready to fight or use force. Having arrived at the spot at 10 a.m., they proceeded to work at the *bund* till the afternoon. At 4 p. m. a body of men, consisting of about 1,200 in all, many of them armed with *lathis* and headed by the prisoners, who were servants of M, which had been seen collecting together during the day, proceeded to the spot, and about 25 or 30 of them attacked T's men, some five of whom were more or less severely wounded with *lathis*.

M's people wholly denied any right on the part of T to construct or repair the *bund*, and had previously denied the existence of such right and refused permission to T to exercise it. It was contended that the assembly of M's people was not an unlawful assembly in that the interference by T's people with the channel of the river justified them in coming to stop the work, and to show a use of force in compelling them to do so.

It was held that as no right of private defence of property was conferred by the Penal Code except as against the perpetrators of offences under the Penal Code, and that as upon the facts of the case found no offence had been committed by T's people, their acts amounting merely to civil trespass ; and that as there was no pressing or immediate necessity of a kind showing that there was not time to have recourse to the protection of the public authority, no question as to the right of private defence arose in the case. It was held therefore that the prisoners had been rightly convicted under Section 147.

It was further contended that M's people did not assemble to enforce a right or supposed right within the terms of Section 141, but to defend a right, and that such action did not make the assembly an unlawful one.

It was held that they were members of an unlawful assembly, the common object of which was by show of criminal force, and by criminal force if necessary, to enforce the right to keep the river channel clear by preventing the construction of the *bund*, and by demolishing it so far as it was constructed, and that the case was under Section 141 (4) (distinguished in 24 C. 686 ; followed in 26 C. 574).

(viii) *Nilmoney Poddar v. Queen-Empress*, 16 C. 442 F. B. (1889).

Separate sentences passed upon persons for the offence of rioting and grievous hurt are not legal where it is found that such persons did not individually commit any act which amounted to voluntarily causing hurt, but were guilty of that offence under Section 149 (6 A. 121 approved ; 11 C. 349 overruled).

(Tottenham, J., dissenting, wrote :—"The actual perpetrator is unquestionably punishable both for rioting and for any other offence he commits," and this portion of his judgment was quoted with approval in 16 C. 725). (Referred to in 8 P. R. 1895.)

(ix). *Mohur Mir v. Queen-Empress*, 16 C. 725 (1889).

When in the course of a riot in which X was attacked and beaten by several of the rioters K inflicted grievous hurt on X, and K and three others of the rioters were charged with offences under Sections 147 and 325 and K was convicted under those sections, and the others were convicted under Sections

and 325/109, 147, and separate sentences were passed on all of them for each of those offences, it was held that the sentences on K were legal, but that as there was nothing to show that the other three had abetted the particular blow which caused the grievous hurt, although they had each of them assaulted X, the conviction of them under Section 325 read with 109 could not be supported.

"Mr. Woodruffe drew our attention to a passage in 11 C. 349:—'If it had been found that the causing of hurt was the force or violence which alone constituted the rioting in the present case, then we should be prepared to hold that the persons could not be punished both for causing hurt and for rioting, but the facts of the case do not warrant such a finding for rioting was being committed before the hurts were inflicted and the two men wounded.'

Without assenting to the proposition of law as thus laid down, we would remark that in this case also the evidence shows that the offence of rioting was committed before P and his companions were actually struck.....The decision in 16 C. 442 dealt with the liability of one rioter for the offences committed by another rioter. It in no way affects the question of the liability of a rioter for the acts committed by himself" (followed in 19 C. 105 ; 40 C. 511).

(x) *Ferasat v. Queen-Empress*, 19 C. 105 (1891).

Held (1) that as resistance to the Police was one of the component parts of the offence of rioting of which the accused were convicted and sentenced to the maximum punishment provided by Section 148, and having regard to the provisions of Section 71, the additional sentences under Section 152 were illegal.

(2) That Section 152 contemplates an assault or obstruction to some particular, public servant, and that as the charge against the accused as framed was merely to the effect that they assaulted and obstructed *members of the Police force*, the conviction could not be upheld.

(3) Separate sentences under Sections 152 and 332 and 333 were illegal, as the hurt inflicted on the Police officers was the violence used towards them which constituted the essence of the offence under Section 152.

(4) Separate sentences under Sections 148 and 332 and 333 were not illegal, there being nothing in Section 71 which limits the amount of punishment which may be imposed for these offences.

The two offences of rioting and causing hurt are distinct offences; the accused were guilty of rioting independent of the hurt they caused; they were guilty of causing hurt independent of the riot. They could be punished for rioting even though they had not themselves caused hurt; they could be punished for hurt even though they had not themselves been members of the unlawful assembly.

When a particular person causes hurt in the course of a riot, he may be punished both for causing the hurt and for taking part in the riot (12 C. 495, 16 C. 725, 6 A. 721, 7. A. 414, 7 A. 757) followed in 40 C. 511.

(xi) *Moher Sheikh v. Queen-Empress*, 21 C. 392 (1893).

When a party is in possession for four or five days, though it may in wrongful possession, another party claiming to be the rightful owner is not entitled to go in force to turn him out, much less is he entitled to take armed men with him for that purpose. In an affray specific evidence as to the acts of each fighter cannot be expected, but only general evidence as to the accused taking part in it, and persons who, as in this case, punted the boats in which the fight took place, and in whose interests the fight on the boats took place, were held to be just as blameworthy as the men who struck the blows.

(xii) *Basiraddi v. Queen-Empress*, 21 C. 827 (1894).

When certain persons were accused of rioting, and it appeared that hat charge did not specify any common object, and that neither the original nor the appellate judgment found what was the common object which made the assembly an unlawful one, it was held that these defects did not vitiate the proceedings, there being ample evidence on the record to prove what the common object of the assembly was, and to justify the conviction for the offence of which the Courts had found the accused guilty.

(xiii) *Wafadar Khan v. Queen-Empress*, 21 C. 955 (1894.)

When the verdict of the jury leaves it uncertain what was the common object which actuated the accused (when two alternative objects were in the charge), it is bad in law, and the conviction must be set aside.

(xiv) *Sarbi v. Queen-Empress*, 22 C. 276 (1894).

Before a conviction can properly be maintained for an offence of rioting, it is necessary that there should be a clea

finding as to the common object of the unlawful assembly, and also that the common object so found should have been stated in the charge in order that the accused person might have an opportunity of meeting it.

If one member of an unlawful assembly is armed with a deadly weapon, the other members cannot on that account be charged under Section 148. It is only the actual person so armed who can be charged under that section.

(xv) *Pachkauri v. Queen-Empress*, 24 C. 686 (1897).

The accused, receiving information that the complainant's party were about to take forcible possession of a plot of land which was found by the Court to be in the possession of the accused, collected a large number of men, some of whom were armed and went through the village to the land in question. While they were engaged in ploughing, the complainant's party came up (some of them being armed) and interfered with the ploughing. A fight ensued, in the course of which one of the complainant's party was wounded, and subsequently died, and two of the accused's party were hurt.

It was held that if the accused were rightfully in possession of the land, and found it necessary to protect themselves from aggression on the part of another body of men, they were justified in taking such precautions as they thought were required and using such force and violence as was necessary to prevent the aggression, and under the circumstances they could not be held to be members of an unlawful assembly.

"The view that we adopt in this case is supported by the cases *Queen-Empress v. Narsang Pathabhai*, 14 B. 441; *Birjoo Singh v. Khub Lall*, 19 W. R. Cr. 66; *Shamsher Singh v. Burmah Mahto*, 23 W. R. Cr. 25. And we might say that the facts of the case of *Ganouri Lal Das v. Queen-Empress* (16 C. 206) are distinguishable from those of the present case." (The rulings cited above are :—

(a) *Birjoo Singh v. Khub Lall*, 19 W. R. Cr. 66.

A person going to the place where an unlawful assembly had gathered, and staying there with the object of preventing mischief to his own property, cannot be said to have intentionally joined an unlawful assembly or to have continued in it.

(b) *In re Shamsher Singh*, 23 W. R. Cr. 25.

The intention of the parties was not to enforce a right or supposed right, but they intended to maintain the actual subsisting enjoyment of a right then existing in an undisturbed condition; it was held that they could not be convicted for being members of an unlawful assembly).

NOTE.—This ruling has been referred to in 26 C. 574, C. 33 295
41 C. 43.

Not approved in 24 A. 143.

(xvi) Queen-Empress v. Chatradhari Goala, 2 C. W. N.
49 (1897).

The accused were present standing without doing anything in a place where murder was committed, and they did not leave the place from which they started with the actual perpetrators of the deed, nor did they share any common object with them, but they were only armed with *lathis* and did nothing to prevent the murder; it was held that they cannot be convicted under Sections 302/149, but they should be convicted of constructive murder under Section 302 read with Section 114 (explained in 27 C. 566).

(xvii) Anant Pandit v. Madhusudan Mandal, 26 C. 574
(1899).

The party of accused accompanied by R went armed with *lathis* to fish in a tank in which R had a two-anna share. The complainant, who with some other co-sharers represented an eleven anna interest in the tank went there with some of these co-sharers to protest on the ground that the accused had no share or interest in the tank. A fight ensued in which some of the complainant's party received slight injuries. It was held that the accused were rightly convicted of rioting and causing hurt under Sections 147 and 323.

"The learned pleader for the petitioner maintained that inasmuch as they had a right to fish, and are found to have a share in the tank, they were justified in proceeding even by force to enjoy that right even if they apprehended resistance on the part of others, that is to say, others having a share in the tank. As an authority for this our attention was drawn to Pachkauri v. Queen-Empress (24 C. 686). It is extremely difficult in cases of this description to adopt a general proposition of law as applicable to the facts of different cases. Some of the observations made in that case may perhaps be applied to th-

facts of the present case; but even that seems doubtful. Our attention has been drawn to *Ganouri Lal Das v. Queen-Empress* (16 C. 206). That case has been distinguished in *Pachkauri v. Queen-Empress*. In our opinion the law laid down in the case of Ganouri Lal is what should be applied to the present case, and so far as we understand the facts of that case, they are analogous to the facts of the present case. If this case is properly distinguishable from the case of *Pachkauri v. Queen-Empress* the opinion we hold is not inconsistent with that judgment."

(xviii) *Chunder Coomar Sen v. Queen-Empress*, 3 C. W. N. 605 (1899).

A person cannot be properly convicted of rioting if the charge does not declare what was the common object of the assembly by which the riot was committed.

(xix) *Hridoy Mondal v. Jagananda Das*, 4 C. W. N. 245 (1899).

Separate sentences under Sections 147 and 353 should not be passed when the common object of the unlawful assembly committing the riot was the offence under Section 353.

(xx) *Raman Singh v. Queen-Empress*, 28 C. 411 (1900).

A large number of persons had assembled to resist all measures for the prevention or suppression of plague, and there was apprehension of a riot. It was held that the common object was to commit an offence, that offence being to assault or use criminal force to the Police Officers; and therefore when the Police arrested a man who refused to act as a special constable, although the arrest was unjustifiable and a conviction under Section 353 could not be maintained, the accused could be convicted under Section 147.

(xxi) *Kazi Zeammuddin Ahmad v. Queen Empress*, 28 C. 504 (1901).

The accused was the sole proprietor of village A. A serious riot involving loss of life took place at village A, and the accused's Naib, instead of doing anything to prevent or suppress the riot, accompanied the rioters and stood close by while the riot was going on, after which he absconded. The accused, who had no knowledge that a riot was likely to be committed, was convicted under Section 154 and fined.

Two out of three Judges held that a landlord is liable under Section 154 for the acts of commission as well as omission not only of himself, but of his agent or manager. Knowledge

on the part of the owner or occupier of the land of the acts or intents of the agent is not an essential element of an offence under Section 154, and he may be convicted under that section although he may be in entire ignorance of the acts of his agent or manager.

There is no ground for holding that Section 154 is intended to punish the landholder when his agent has not rendered himself liable to criminal law, and that when the agent has done so, his liability comes to an end. On the contrary the provisions of this section impose on unresident landholders and their agents the duty of maintaining the public peace and preventing unlawful assembly or riots on their estates, and render the former liable for any dereliction in the discharge of this duty. (Followed Queen-Empress v. Payag Singh, 12 A. 550.)

(xxii) *Uma Charan Singh v. Emperor*, 29 C. 244 (1901).

Resistance was made to the execution of a warrant issued by a Civil Court for the attachment of the moveable property of the judgment-debtor the warrant being general in its terms, and not purporting on the face of it to authorise the seizure of the property of the judgment-debtor, nor giving the person executing it authority to enter his house. It was held that the warrant was not one which could be lawfully executed against the judgment-debtor, and that resistance to the execution of such warrant would not constitute an offence under Section 147.

It was held further when one of the party resisting the execution had exceeded his rights and inflicted a severe injury on one of the opposite party, his conviction under Section 325 is lawful.

It is also held that Section 141 (2) does not have the effect of making an assemblage of persons an unlawful assemblage if the object with which they assembled was a perfectly legal one.

(xxiii) *Yakub Ali v. Lethu Thakur*, 30 C. 288 (1903).

The accused were convicted of rioting ; that was the only charge before the Magistrate. The Sessions Judge acquitted them of rioting and convicted them under Sections 448 and 323. It was held that the convictions were bad, as those were distinct and separate offences, which should have been the subject of separate charges.

(xxiv) Harendra Chandra Sarkar *v.* Emperor, 7 C. W. N. 512 (1903).

In order to convict a person under Section 148, it must be shown that each individual person charged was himself armed.

(xxv) Sahadev Ahir *v.* Emperor, 8 C. W. N. 344 = 1 Cr. L. J. 199 (1903).

It is illegal to pass separate sentences for the offences of rioting and hurt upon persons who are not proved to have individually committed any acts which amounted to voluntarily causing hurt, but are guilty of that offence under Section 149.

(xxvi) Abinash Chandra Aditya *v.* Ananda Chandra Pal, 31 C. 424 (1904);

Accused were convicted under Sections 147, 353/149, 379/149 for resisting execution by an officer who attempted to give possession under a time expired warrant. It was held that there was no unlawful assembly and therefore the convictions should be set aside.

(xxvii) Harendra Lal Roy *v.* King-Emperor, 8 C. W. N. 908 = 1 Cr. L. J. 866 (1904).

An absentee co-sharer who takes no active part in the management of the property is not liable to be convicted under Section 155, when there are other co-sharers, and one of them has been convicted under that section.

(xxviii) Bhola Mahto *v.* Emperor, 9 C. W. N. 125 = 2 Cr. L. J. 13 (1904).

Though a Magistrate's order to the Police to take charge of paddy pending proceedings under Section 145 may not have been legal, yet when the Police, in pursuance of the order, proposed to guard it, the act of the Police did not justify recourse to armed violence, especially as the Police acted in an open straightforward manner, simply announcing what the orders they received were.

(xxix) Poresh Nath Sircar *v.* Emperor, 33 C. 295 (1905).

It was held by two Judges (the third dissenting) that where the judgments of the Appellate Court and the Magistrate contain no finding as to what the common object of an unlawful assembly, if any, was, the conviction ought to be set aside.

Where the charge did not specify the property, the taking possession of which was stated to be the common object of the unlawful assembly, and its specification would have altered the whole complexion of the case, it was held by the majority that the omission prejudiced the accused (followed 11 C. 106, 22 C. 276, 3 C. W. N. 605).

When petitioner was maintained in possession of certain lands under Section 145, Cr. P. C., including the homestead of A, and the opposite party unlawfully attempted to take possession of some huts standing thereon, whereupon the petitioner came with an armed body and demolished the huts, and on being resisted by the opposite party wounded some of them, it was held by the majority that they were justified in taking precautions and using such force as was necessary to prevent aggression of the opposite party.

Page 305:—"The present case appears to be rather within the rule that if persons are rightfully in possession of land and find it necessary to protect themselves from aggression, they are justified in taking precautions and using such force as is necessary to prevent the aggression, see *Pachkauri v. Queen-Empress.*"

(xxx) *Budhu v. Mussamat Lachminia*, 9 C. W. N. 599=2 Cr. L. J. 275 (1905).

In all cases in which there is a charge under Section 147, the common object ought to be stated. But it does not follow that a conviction under the section is bad, if the common object is not stated. It is necessary to see whether or not the accused has been misled by the omission, and whether it has caused a failure of justice. When the facts were simple and there were distinct findings as to the part which each party took in the rioting, it was held that the accused were not prejudiced by the omission to set out in the charge the common object of the assembly.

(xxxi) *Bepin Behari Guha v. Pranakul Majundar*, 11 C. W. N. 176=5 Cr. L. J. 19 (1906),

When one of the parties entitled to joint possession is out of possession, he has no right under the law to take forcible possession after assembling a number of armed men and going to the place and thereby intimidating the people in possession.

(xxxii) *Jairam Mahton v. Emperor*, 35 C. 103 (1908).

The accused went out with three ploughs on land to which the complainant had a right to possession, and of which

he was in such possession till such entry, and began to plough up the land, to uproot some castor plants and throw them away. While they were thus in actual, but temporary, occupation, the complainant and his party went on the land and tried to unyoke the cattle, whereupon a riot took place.

It was held that the accused were not justified in entering the land in ploughing it, uprooting the plants, and throwing them away; that they were members of an unlawful assembly, the common object of which was to enforce a right or supposed right for the execution of which they were prepared to use force, and that their action in beating the complainant's party was not justified by the fact of their having obtained temporary occupation.

Page 108.—“In a case coming under Chapter VIII of the Penal Code the question as to who was in actual occupation just before the occurrence took place is of paramount importance, and a right to possession or constructive possession is not generally of much importance. If a person has the right to possession and was constructively in possession, but was not in actual occupation just before the occurrence, he may ordinarily have recourse to the proper authorities for the prevention of any wrong to him, and he should not be allowed to plead the right of private defence of property. The right of private defence of property is a restricted right. Section 99 expressly lays down that there is no right of private defence in cases when there is time to have recourse to the protection of the public authorities, and it also lays down that the right of private defence in no case extends to doing more harm than is necessary for the purpose of defence. Sections 100 to 105 make the right depend on the circumstances of each case. No man has the right to take the law into his own hands for the protection of his person or property if there is a reasonable opportunity of redress by recourse to the public authorities.....If a person prefers to use force in order to protect his property when he could for the protection of such property, easily have recourse to the public authorities, his use of force is made punishable by the Penal Code. No matter what the intention of that person may be, the law says that he must not use force in such a case.

In Queen-Empress *v.* Tirakadu (14 M. 126) Muttusami Ayyar, J., speaking of the words “to enforce a right or supposed right” in Section 141 said:—“It is perfectly immaterial whether the act which one seeks to prevent by the use of criminal

force is legal or illegal, the test of criminality being the determination to use criminal force or act otherwise than in due course of law so as to threaten the public peace." Redress must be sought in ways other than the use of force by the person who thinks that he has been illegally dispossessed or is entitled to possession of property.

Then again, assuming that an accused is entitled to plead the right of private defence of property, the exercise of force must be regulated according to the nature of the action which is taken by the opposite side, and which requires such an exercise of force. The danger to property may be imminent or incapable of redress if measures are not immediately taken. The law, however, provides that no more force should be used than is necessary. The question in each case therefore must be to what extent force may be used, and this is a question of fact."

Reference was made to 16 C. 206 and 24 C. 686; and Poresh Nath Sircar's case, 33 C. 295, was distinguished on the ground that, although the other side had taken forcible possession, the accused had obtained possession in proceedings under Section 145 and were legally in possession.

(xxxiii) *Kabiruddin v. Emperor*, 35 C. 368 (1908).

The object of one party was to repair an embankment for which there was no pressing necessity. This party went in large numbers, fully armed, knowing that they would be resisted. It was held that there is no right of private defence where two parties arm themselves for a fight to enforce right or supposed right, and deliberately engage in large numbers in a fight. In such a case, if it is not shown that the accused were acting within the legal limits of the right of private defence, it does not matter which party was the first to attack.

(Citing 35 C. 103; following I.C.L.R. 521.) Followed in 36 P.R. 1918.

(xxxiv) *Maniruddin v. Emperor*, 35 C. 384 (1908).

Accused numbering from 40 to 60, armed with *lathis*, spears and heavy billets of wood, proceeded to disputed land, attacked the complainant and his father and destroyed the crops growing thereon. Both parties claimed that the lands had fallen to their shares on partition. The Magistrate found

that the complainant was in possession and had grown the crops. It was held that the right of private defence did not arise, as there was no invasion of the petitioner's right on the day of the occurrence, and in any case they had ample time to have recourse to the authorities for the protection of their rights.

No right of private defence arises when a large body of men come armed and prepared to fight, and attack the opposite party with intent to enforce their right or supposed right to certain land.

When the accused were charged with rioting with intent to dispossess the complainant, but the Appellate Court thought the question of possession not clear, and found them guilty of rioting with the intention of enforcing their rights or supposed rights, it was held that both the common objects raised the same questions and that the accused were in no way prejudiced.

(xxxv) Emperor v. Ambika Lal, 35 C. 443 (1908).

The complainant's party went to cut a *bund* on the land of the master of the accused. The accused assembled to the number of 50 or 60 armed with *lathis* and proceeded to the *bund*. The complainant's party had either finished cutting the *bund* or ceased to do so, when they saw the accused approach. Some of the accused beat a man who was standing there, but was not connected with the cutting, and they beat him again on returning from the chase as he lay on the ground, so that he died soon after.

It was held that the accused were members of an unlawful assembly from the beginning as they went armed with *lathis* and in large numbers to enforce their right at all hazards that, if not so at the beginning, they became an unlawful assembly, and had no right of private defence when the opposite party had ceased cutting the *bund*; and that, even if they had, they exceeded their right by attacking their opponents and chasing them and by beating the deceased.

(xxxvi) Manaruddi v. Emperor, 35 C. 718 (1908).

When a charge drawn up by the Magistrate alleges several alternative common objects of the unlawful assembly, it is incumbent on the Appellate Court to determine whether it is sustainable; and, if so, which of the common objects stated has been made out.

(xxxvii) Dasarathi Mahapatra v. Raghu Sahu, 36 C. 158 (1909).

When the common object of an unlawful assembly was stated in the charge to be to enforce a right or supposed right, and there was no dispute as to the common object in the lower Courts, which did not therefore discuss the question or come to any express finding in so many words on the point, it was held that they had impliedly found the common object of the assembly to be the same as stated in the charge, and the accused had been in no way prejudiced.

"In Sarbi v. Queen-Empress, 22 C. 276, it is only said that there should be a clear (not an express) finding as to the common object, and the reason for that expression of opinion was that in that case there were two possible common objects of the assembly, and it was not apparent which of them had been accepted by the Judge or the Jury.

In the case of Poresh Nath Sircar, 33 C. 295, the judgment of the Magistrate contained no finding what the common object of the assembly was, and the facts found by the Sessions Judge completely negatived the common object set out in the charge which was not stated with due precision."

' (xxxviii) Baijnath Dhanuk v. Emperor, 36 C. 296 (1909).

If accused are justified in resisting theft of their crops, they cannot be considered as members of an unlawful assembly with the common object to assert a right to the disputed land and crop because some members thereof may have exceeded the right of private defence; but when individual members of an assembly exceed the right of private defence, the assembly would become an unlawful assembly if other members knowing that the right of private defence had been exceeded by some members by the assembly continued in it (citing *in re Kalse Mundle*, 10 C. L. R. 278).

(xxxix) Ram Khelawan Singh v. Emperor, 36 C. 821 (1909).

A zemindar's party went to the spot where tenants were endeavouring to remove produce contrary to their right, and a fight took place wherein some of the tenants received hurt. It was held that inasmuch as the common object of the accused was to protect the zemindar's rights over the crop, and there was no specific finding that their intention

was to use more force than necessary, or that they had actually used excessive force, they acted in exercise of the right of private defence, and were not guilty of rioting. Application had previously been made by the zemindars for action under Section 107, Cr. P. C., to prevent an anticipated riot.

It was also held that there was nothing to show that the grievous hurt caused by one of the accused was not his own individual act, or that the assembly, which in its inception was not unlawful, became an unlawful assembly subsequently.

„Each case of this kind must be decided upon its own particular facts. The facts in this case were distinguishable from those in 36 C. 296.”

(xl) *Silajit Mahto v. Emperor*, 36 C. 865 (1909).

The accused were in possession of disputed land and went upon it in a large body armed with *lathis*, prepared in anticipation of a fight, and were reaping the paddy grown by them, when the complainant's party came up and attempted to cut the same, whereupon a fight ensued, and one man was seriously wounded and died subsequently.

It was held that the common object was not to enforce a right or supposed rights, but to maintain undisturbed the actual enjoyment of a right, and the assembly was not therefore unlawful under Section 141 (4).

When one accused under the circumstances caused simple hurt, and another a fracture of the skull which ended fatally, the former was within his right of private defence, but the latter had not proved facts bringing the case within Section 103 (4); the latter was convicted under Section 304.

With regard to the charge it was held that the question is whether the common object established agrees in essential particulars with that laid down in the charge. It is not a general proposition of law that a conviction under Section 147 cannot be supported whenever the common object as stated in the charge is not precisely made out.

(xli) *Kanta Neya v. Emperor*, 12 Cr. L. J. 82--9 Ind. Cas. 455 (1911).

It cannot be said that any minor offence is included in Section 147. The use of criminal force is a necessary ingredient in that offence; but any particular kind of voluntary use

of such criminal force may and should be separately charged either substantively against the individuals who committed the offence, or for the purpose of using Section 149 against all the rioters.

(xlvi) *Kudrutulla v. Emperor*, 39 C. 781 (1912).

In cases of rioting the common object should be stated in the charge, but the omission to state it under Sections 143 and 147 does not vitiate a conviction if there is evidence on the record to show it. It is otherwise with a charge under Section 149, for there is no specific name for the offence, and the fact that any offence is committed in prosecution of the common object is of the essence of the case, and there could be no conviction of any offence committed with a different object. It is obligatory to set out the common object in a charge under Section 149 unless it has already been specified in the main charge under Section 147. (Dissented from in 16 P. R. 1915.)

(xliii) *Siva Sundari Chowdhurani v. Emperor*, 39 C. 834 (1912).

The criminal liability of a person specified in Section 154, I. P. C., for the acts or omissions of an agent or manager depends upon the question by whom the latter was appointed.

(xlv) *Kunja Bhuiya v. Emperor*, 39 C. 896 (1912).

When an attack is made on persons acting in the lawful exercise of their right over property, they are entitled to the right of private defence, and the only question that arises thereafter is whether any member of the party exceeded that right. Persons exercising their rights are not members of an unlawful assembly, nor can the assembly become unlawful by their repelling an attack made on them by persons who had no right to obstruct them, nor, by exceeding the lawful use of their right of private defence. In such a case each is liable only for his individual acts done in excess of such right.

A decree-holder's party with the Civil Court officers went upon a plot of land in the possession of the judgment-debtors to take possession thereof, and the drummer was assaulted by one of the latter, whereupon the decree-holder's party replied by an attack on their opponents, during which one of the party fractured the skull of the drummer's assailants by an isolated act, but the appellants continued to beat him after he had fallen to the ground.

The conviction under Section 147 was set aside, but the appellants were held to be guilty under Section 323, having exceeded their right by beating the wounded man after he had fallen.

(xlv) *Reazuddi v. King-Emperor*, 16 C. W. N. 1077=15 Ind. Cas. 646=13 Cr. L. J. 502 (1912).

When a Court draws up a charge under Section 325 read with Section 149, it clearly intimates to the accused persons that they did not cause grievous hurt to anybody themselves, but that they are guilty by implication of such offence inasmuch as some body else in prosecution of the common object of the riot in which they were engaged did cause grievous hurt. When these accused persons are acquitted of rioting, obviously all the offences which they are said to have committed by implication disappear, and the defence cannot be called upon to answer to the specific act of causing grievous hurt simply because it may have appeared in the evidence.

(xlvi) *Sita Ahir v. Emperor*, 40 C. 168 (1913).

Persons charged with rioting with the common object of causing hurt to one person cannot be convicted of causing hurt to another person.

Page 171.—“Supposing in the case of trial for rioting, the evidence shows that murder has been committed, can it be said that the accused can be convicted of murder by the Magistrate on the charge of rioting, or that he can be committed to Sessions without any charge being framed? The matter is not an irregularity, but an error of law which vitiates the trial.

(xvii) *Ram Angutha Singh v. Emperor*, 40 C. 511 (1913).

Separate sentences for the offence of rioting and hurt are legal when it is found that each person took an individual part in the assault.

16 C. 442 was distinguished, as it was only found therein that separate sentences were not legal when it is found that the accused did not cause hurt, but were guilty of that offence under Section 149. 16 C. 725 and 19 C. 105 followed.

(xviii) *Baburam Raut v. King-Emperor*, 17 C. L. J. 394 =14 Cr. L. J. 295=19 Ind. Cas. 951 (1913).

When a person grows crops on a piece of land which another person cuts and carries away and stacks in a field of a third person without interruption, and retires from the field,

and the person growing the crops comes up accompanied by others armed with *lathis* and *gurasa* and other weapons, not to commit a premeditated riot, but merely to take away their own crops and not to use any force unless they were opposed and attacked, and while so acting within their rights in collecting their own crops they were attacked by the party of the persons who stacked the crops, who were also similarly armed, first by clods of earth and then by spears, it was held that they had the right to defend their persons from an attack with clods and spears, an attack which reasonably causes apprehension that death will result, and to cause any injury short of death.

(xlix) Ramnandan Prosad Singh v. Emperor, 17 C. W. N. 1132 = 14 Cr. L. J. 463 = 20 Ind. Cas. 623 (1913).

Complainants' party constructed a dam across a pyne exclusively belonging to the petitioners, who had obtained an injunction from the Civil Court restraining the complainants' party from interfering with the petitioners in their use and occupation of the pyne. The petitioners in attempting to cut the dam were opposed by the complainants' party, two of whom were struck by the petitioners, and the petitioners were convicted of rioting and causing grievous hurt.

It was held that after the Civil Court decree and injunction the petitioners could not be held to be "enforcing a right," and the presence of the complainants' party in opposing the petitioners was a criminal trespass which entitled the petitioners to the right of private defence. The phrase "to enforce a right" can only apply when the party claiming the right has not possession over the subject of the right, and there lies the distinction between "enforcing a right" and "maintaining a right."

(l) Fateh Singh v. Emperor, 41 C. 43 (1914).

The servants of a party, who had obtained delivery of possession of certain land in execution of a decree, went upon it accompanied by a number of other accused with *lathis* and were engaged in ploughing it when they were attacked by a large body of men belonging to the party of the judgment-debtor. A fight ensued, in the course of which some members of both sides received injuries.

It was held that their master having been put into actual possession by a competent Court, the servants were not guilty of rioting or of constructive grievous hurt although the

delivery of possession was alleged to be of doubtful legality, and was the subject of an objection by the judgment-debtor pending decision at the time of the occurrence.

A delivery not merely gives possession to a party, but it connotes permission to utilize the subject of it in any lawful manner such as entering upon the land, tilling it, growing and harvesting the crops, and enjoying the produce. Persons engaged in exercising a lawful right of which they are in enjoyment cannot be said to be enforcing a right, but merely to be maintaining it.

Page 49:—"The petitioners were justified in repelling the attack upon them by persons who had no right to obstruct them, and they cannot be held to have been guilty of rioting. It is obvious that if the case of rioting fails, their conviction for the offence of hurt must also fail, as that is a conviction by implication only. There is nothing in this case to show that even if there were a charge against individual petitioners of causing hurt, they had exceeded the right of private defence. We hold that the case of *Pachkauri v. Queen-Empress* (24 C. 686) has the fullest application to the circumstances of the present case."

(ii) *Prokash Chandra Kundu v. Emperor*, 41 C. 836 (1914).

On a charge of rioting with the common object of assaulting public servants, persons shown to have committed a separate offence under Section 353 may be separately sentenced thereunder even though the common object of the riot was to commit that offence.

"The rulings of this Court have for a long series of years been to the effect that separate sentence should not be passed upon people guilty of rioting for the offence which is specifically stated to have been the common object of the assembly unless, as has been held in several cases, a specific charge is laid against the individual members of committing such offence.....P. 843.—Those persons who committed separable acts of assault should be more severely punished than those who did not.....Encouragement of riot is quite sufficient to bring a person within the purview of the law of rioting.

(iii) *Pramatha Nath Roy v. King-Emperor*, 17 C. W. N 1247 = 15 Cr. L. J. 1912 = 2 Ind. Cas. 767 (1914).

Petitioners were convicted under Section 155, and they admittedly had no property in the land in respect of which the riot took place, but their mother and the wife of one of

them had an interest therein. The Sessions Judge in appeal relying on the evidence that the petitioners demanded *kabuliya*s from tenants found that they were claiming an interest in the land, although there was no evidence to prove that the petitioners demanded the *kabuliya*s for themselves. It was held that the finding that the petitioners were claiming an interest in the land could not be supported, and the conviction under Section 155 must be set aside. It was also held that in the case under Section 155 the Magistrate should have excluded the record of the riot case.

(*lvi*) *Chandulla Sheikh v. King-Emperor*, 18 C. W. N. 275 = 15 Cr. L. J. 209 = 22 Ind. Cas. 993 (1914).

The opposite party erected some huts stealthily at night on a plot of land of which the petitioners were in peaceful possession, and it was alleged that the opposite party were in possession for about 14 hours, and the petitioners at break of day, on coming to know of this, took the earliest opportunity to exercise their own right of private defence, and came to the spot armed to turn out the opposite party, who were found by them still engaged in erecting more huts, and there was a free fight between the parties, and the petitioners did not inflict more hurt than was necessary for defending themselves. It was held that the petitioners were not guilty of rioting, and that in the circumstances of the case, they had no time to have recourse to the public authorities, and were entitled to their right of private defence.

(*lvii*) *Har Naran Sardar v. Emperor* 18 C. W. N. 1274 = 16 Cr. L. J. 42 = 26 Ind. Cas. 634 (1914).

(Exactly similar to Genu Manjhi's case except that the conviction by the Sessions Judge was under Section 353.)

(*lviii*) *Genu Manjhi v. King-Emperor*, 18 C. W. N. 1276 = 15 Cr. L. J. 704 = 26 Ind. Cas. 152 (1914).

When there is no charge framed against the accused for the offence of causing hurt, and they had been convicted by the Magistrate under Section 147, a conviction by the Sessions Judge under Section 323 must be set aside

(*lx*) *In re Choitano Ranto*, 16 Cr. L. J. 446 = 29 Ind. Cas. 78 (1915).

When only one of the rioters is proved to have been in possession of a gun, others cannot be committed under Section 148 read with Section 149.

(lvii) Panchanon Bose v. Emperor, 23 C. W. N. 693 = 30 C. L. J. 19 = 52 Ind. Cas. 881 (1919).

In a criminal case the burden of proving the charge substantively as drawn lies on the prosecution.

The common object of the unlawful assembly of which the petitioners were said to have been members, and for which they were convicted under, Sections 147 and 148 was to cause obstruction to measurement and demarcation of *khas mahal* land by a kanungo and a *khas mahal* tahsildar. The land in question had lain fallow up to the date of the occurrence, and there was considerable doubt whether the prosecution had established that on the date of the occurrence actual possession of the land was with the Government.

Held, that having regard to the condition of the land and the nature of the acts of possession on which the parties relied, it was not established affirmatively, that the land on which the alleged riot took place was in the actual possession of Government, and that therefore the charge as alleged was not proved, and the petitioners were not guilty of rioting with the common object stated in the charge.

(liii) Kala Nath Barman, x. Emperor, 24 C. W. N. 856 = 57 Ind. Cas. 929 (1920).

Accused were charged under Sections, 363 and 147 with the common object of kidnapping. The girl was not proved to be under 16, and therefore the charge of kidnapping could not be sustained, and in consequence the charge of rioting with the common object of kidnapping also failed. The Magistrate convicted under Section 143 for being members of an unlawful assembly with the common object to commit assault and unlawful restraint. The Sessions Judge set aside the conviction on the ground that they could not be convicted of being members of an unlawful assembly with a different common object, but ordered a fresh trial under Sections 365 and 147.

It was held that the accused were protected by Section 403, Cr. P. C., and could not be tried again.

D. Madras.

(i) High Court Proceedings, 10th August 1869 = 1 Weir 55 = 4 M. H. C. App. 65.

Where the ryots of a portion of a zemindari which had been sold under a decree of a civil court reaped and carried away their crops despite the purchaser's people, and refused to allow them to seal and mark the heaps which had been reaped, it was held that the acts of the ryots did not fall within clauses 3, 4, or 5 of Section 141 because their common intention was not to commit an offence, but to protect their own possession of grain and to prevent the purchaser from enforcing his supposed right.

(ii) High Court Proceedings, 8th January 1873, No. 59 1 Weir 58 = 1 M. H. C. App. 35.

If persons are charged with rioting for the purpose of enforcing a supposed right by show of criminal force, they cannot plead the illegality of the act of their opponents, unless such acts bring them within the category of those in which self defence would be permitted by the Penal Code.

(iii) Appavu Nayak v. Queen, 6 M. 245 (1882).

When the lessees of the mortgagee of a widow to whom certain property belonged made a forcible entry on such land and committed assault on the persons in possession of the land although they were mere trespassers, it was held that they were properly convicted of rioting.

(iv) Queen-Empress v. Ramayya, 13 M. 148 (1889).

The complainant, a landlord, tendered to his tenant a *patta* which contained provisions which were illegal, and was not such a *patta* as the tenant would have been bound to accept. The complainant distrained the tenant's cattle for arrears of rent, whereupon he, with the assistance of 11 others, forcibly recovered the distrained property. The cattle had been actually seized and driven some 20 yards, before the tenant and his men forcibly obstructed their removal. The distraint itself was carried out under Section 19 of the Rent Recovery Act, the assistance of the police having been secured for that purpose. It was held that the use of force to rescue the cattle was unlawful, and that there was no right of private defence of property, as the cattle had been already attached.

(v) Queen Empress v. Subba Naik, 21 M. 249 (1898).

A caused crops to be sown on the land as to the enjoyment of which there was a dispute between her and B. Persons having proceeded to reap the crops on behalf of B, the servants of A went to the place with the Station House Officer and some constables who were armed. The Station House Officer ordered the reapers to leave off reaping and to disperse, but they did not do so. He then told one of the constables to fire into the air. Some of the reapers remained and assumed a defiant attitude. The Station House Officer without attempting to make any arrests, and without warning the reapers that, if they did not desist from reaping, they would be fired at, gave orders to shoot, and one of the constables fired and mortally wounded one of the reapers.

It was found that neither the Station House Officer nor the constable believed that it was necessary for the public security to disperse the reapers by firing on them, and therefore they were not acting in good faith, and the order to shoot was illegal and did not justify the constable, and both he and the Station House Officer were guilty of murder.

The degree of force which may lawfully be used in the suppression of an unlawful assembly depends on the nature of such assembly, for the force used must always be moderated and proportional to the circumstances of the case and the end to be obtained (Lord Bowes' Report on the Colliers' Strike and Riot, 1893).

The taking of life can only be justified by the necessity for protecting persons or property against various forms of violent crime or by the necessity of dispersing a riotous crowd which is dangerous unless dispersed (*Keighly v. Bell*, 4 F and F 763, at page 790; *Rex. v. Suddis*, 1 East 306, at page 312; and Alexander Broadfoot's case, *Foster's Criminal Law* 154).

(vi) King Emperor v. Ayya Annasamy Aiyar, 25 M. 624 (1901).

Paddy belonging to a Society to which the first accused belonged had been in possession of the first accused for some time before the date of the occurrence, and was in his possession on that date. The complainant, as Treasurer of the Society, endeavoured forcibly to take possession of the paddy with his servants, whereupon all the accused resisted him and maintained the possession of the first accused, some blows being struck. It was held that no offence of rioting was committed.

(vii) *Regula Bheemappa v. Emperor*, 26 M. 249 (1902).

The villagers of C walked in a religious procession through a part of the village of K carrying with them a vessel containing water which purported to be consecrated. The villagers of K, objecting, obstructed the procession, whereupon the members of it resisted the obstruction and used some violence, causing grievous hurt to one of the obstructors and hurt to others.

The members of the procession were charged with and convicted of being members of an unlawful assembly possessing deadly weapons and causing grievous hurt, and their convictions were upheld. It was held on revision that the convictions were wrong. The accused were justified in the circumstances in exercising the right of private defence, and the harm inflicted was not more than appeared to have been necessary for the purpose of self-defence.

(viii) *In re Vyapuri Chetti*, 5 M. L. T. 285 = 4 Ind. Cas. 1142 = 11 Cr. L. J. 197 (1909).

When out of 15 persons complained against only 5 persons were found guilty and convicted of rioting, and it appeared that only three out of the five convicted persons might have had a common object, it was held that the conviction could not be upheld. Before there can be an unlawful assembly and rioting there must be five persons with a common object.

(ix) *In re Logan Athaiyar*, 6 M. L. T. 17 = 11 Cr. L. J. 30 = 4 Ind. Cas. 700 (1910).

In the absence of evidence or reasons to the contrary it is permissible to presume that the common object of a riotous mob is that indicated by their conduct, and that they entertained from the beginning the common object indicated by their conduct throughout. The proceedings of a riotous mob, which from first to last showed a continuity of purpose and of action and were united by a close proximity in time, form one transaction so as to render all the rioters liable to be tried at the same trial for the acts done by each of them.

Per Sankaran Nair, J. :—The essence of the offence defined in Section 141 is the common unlawful purpose and an accused person cannot be convicted if the common object proved is different from the common object in the charge or for which he

has been tried. Persons to be tried jointly for an offence under Section 142 must have been associated from the first in the series of act which forms the same transaction.

(x) *Ranga Koravan v. Emperor*, 9 M. L. T. 362 1911, 1 M. W. N. 130=12 Cr. L. J. 124=9 Ind. Cas. 727 (1910).

The deceased was killed by a violent blow given by one of the accused, who was a member of an unlawful assembly, and it was found that the beating of the accused with a stone was not in pursuance of the common object of all the accused. It was held that person who dealt the blow was guilty under Section 304, and the rest only of rioting under Section 147.

(xi) *Golla Hanumappa v. Emperor*, 35 M. 243 (1912).

There was a riot in which one man was killed, and it was not certain who gave the fatal blow.

It was held that the evidence was sufficient to prove that all the accused were members of an unlawful assembly and were guilty of rioting, and that they were all responsible for the injuries inflicted on the several prosecution witnesses in the course of the fight. The existence of a common object before the fight began was not necessary to justify the conviction of the accused for rioting. It was enough that six of the accused adopted the common object of the other three to cause hurt to the prosecution party. All the accused were convicted under Section 147 and Sections 325 and 326 read with Section 149.

(xii) *Sengoden v. Emperor*, 13 Cr. L. J. 534=15 Ind. Cas. 806 (1912).

The members of a religious community or denomination have every right to pass through the King's Highway in procession for religious worship. Assaulting a religious procession with the common object of disturbing it amounts to rioting.

(xiii) *In re K. Bali Reddi*, 37 M. 119 (1914).

When five men attack another with sickles and a spear and inflict such severe injuries that he dies within 15 or 20 minutes, it is not reasonable to hold that they did not intend to kill him.....It is immaterial to say that he was not an important member of the opposite faction, or that if they had intended to kill him they would have not left him alive, or that the deceased gave some provocation by throwing stones. It was certainly not of so grave and sudden a character as to have deprived the accused of their power of self-control.

The High Court has power on revision to alter a finding of rioting into one of murder.

(xiv) *In re Sambo Pillai*, 2 M. W. N. 213 = 35 Ind. Cas. 823 = 17 Cr. L. J. 391 (1916).

The accused had sown the crops and harvested them; the complainant's party after the harvest entered upon the land and ploughed it, whereupon the accused party went to the field armed with sticks. It was held that a person who has been found to have reaped the crops and to have been in possession of the property must be deemed to be lawfully in possession, and anything which disturbs his possession must be taken to be a trespass; therefore, following 41 C. 43 which shows that, in maintaining the right to possession the accused are entitled to go armed with *lathis*, it was held that the conduct of the accused in going to the field with a number of people armed with sticks did not constitute them members of an unlawful assembly. They took the sticks to protect themselves and not to use them against the opposite party without provocation.

(xv) *Penumetsa Thirumahaju v. Emperor*, 44 Ind. Cas. 40 = 19 Cr. L. J. 248 (1913).

Persons exercising their right of private defence are not members of an unlawful assembly by repelling attacks made on them or by exceeding that right of private defence (see *Khunja Bhuiya v. Emperor*, 39 C. 896). If any person exceeds his right of private defence, he will be individually liable for any injury caused.

(xvi) *Krishna Ayyar v. Emperor*, 24 M. L. J. 96 = 526 M. W. N. 1918 = 49 Ind. Cas. 337.

It has been well-settled that when the object of an unlawful assembly is to cause hurt, then a member of that unlawful assembly, if he is convicted under Section 147, cannot be convicted also under Sections 323 and 325 read with 149.

Where there were three different unlawful assemblies at three different places, each with a different common object, but all in pursuance of a common purpose and design, viz. to prevent Police Officers from searching a place, and the whole occurrence arose out of a common cause, the acts of all the accused were parts of the same transaction, and might be the subject of charge in one and the same trial.

E. Punjab.

(i) Koura Khan v. Crown, 34 P. R. 1868 :

An assembly of five or more persons, with any one of the common objects enumerated in Section 141, is an unlawful assembly whether the object is in their minds when they came together or whether it occurs to them afterwards. The use of any force, even though it be of the slightest possible character, by any one of an assembly once established as unlawful constitutes rioting.

(ii) Alladad v. Crown, 1 P. R. 1870 :

The accused had occasion to enter a village on lawful business, and had reason to believe that an attack would be made upon him by a hostile party to prevent his carrying out such business. To protect himself he entered the village accompanied by 40 accused men. The hostile party, which was numerous, came out to watch his movements ; and the accused and his men, believing (as they alleged) that an immediate attack was intended by the opposite faction, assaulted the latter and wounded several of them.

It was held that even if the accused and his party acted under the belief alleged, yet as they knew that an attack was likely to be made upon them, the preparations made to secure the entry into the village being themselves provocative, amounted to a show of criminal force, and were not covered by the right of private defence, and that therefore the accused constituted an unlawful assembly under Section 141, and the violence used by them supported a charge of rioting.

(iii) Habib, etc. v. Crown, 5 P. R. 1877 :

When the accused are members of an assembly resisting by force the taking of their property, and in the scuffle one of the attacking party is killed, but by whom it cannot be proved, as the common object of the resisting party is not unlawful, each member of it cannot be held responsible for the act of one exceeding the right of private defence of property, and therefore conviction under Section 147 is unsustainable.

(iv) Nawab v. Emperor, 26 P. R. 1881 :

There must be two separate trials of opposing factions of rioters.

(v) Empress v. Saifulla, 15 P. R. 1882 :

Ditto.

(vi) Rasul v. Empress, 4 P. R. 1889:

In this ruling Plowden, J., discussed the law of rioting at some length.

He dissented from the general propositions laid down in 23 W. R. Cr. 25 (1) that there is a distinction to be drawn between "enforcing a right and supposed right" and "maintaining undisturbed the actual subsisting enjoyment of a right which was at the time being exercised," and (2) that everyone has the right to protect himself in the actual enjoyment of his property and in the actual exercise of his rights unless the case be such that the third class of Section 99 applies.

With regard to the first proposal, he considered that "the distinction was unreal, because if the object of maintaining the enjoyment was to be gained by means of or by show of criminal force, he would describe the object as being to enforce the right and supposed right of enjoyment by means of or by show of criminal force."

With regard to the second proposal, he wrote: "No doubt every person has a right to protect himself and his property by all lawful means. But this qualification virtually destroys the proposition. To use criminal force or show of criminal force even upon grave and sudden provocation is an offence only subject to the general exceptions. Among them is the exception as to the right of private defence, which permits the use of force under certain circumstances and within certain limits to defend.....property, moveable and immoveable, against certain specified offences. There is nothing in the section as to the right of private defence about rights in or over property as distinguished from the property itself, and nothing to give a greater right to a person in possession of property than to any other person in respect of that property when threatened or attacked.....p. 30. The fact that the persons who assemble and use force are in possession of a right in or over property, which property is threatened or attacked by others, and which they endeavour to defend, is always an important point in a case of alleged rioting as suggesting that the members of an assembly may be entitled to the benefit of the exception as to the right of private defence; but the importance of this single fact may be and

commonly is exaggerated. It may confidently be laid down that it is not the law of the Penal Code that five or more persons may assemble and resort to force or violence, and justify all they do for the purpose of protecting their possession of a right or of property merely on the ground that they were in possession of the right or of the property, and were endeavouring to protect it."

(vii) *Tokha v. Queen-Empress*, 8 P. R. 1895:

The accused were convicted of rioting under Section 147 and of causing grievous hurt under Sections 149 and 325.

"The offence of causing grievous hurt was one which all the appellants must have known was likely to be committed by some of them in the prosecution of their common object. When a lot of villagers assemble with sticks in their hands intending to attack and injure an opposite faction, and when two of that opposite faction are wounded, it is impossible that they did not all either intend to cause grievous hurt, or at least know that grievous hurt was likely to be caused. This would be so even if some of them were not armed with sticks; the difference would be only one of punishment, but in the present case the evidence is that all had sticks. Grievous hurt was caused, and was undoubtedly caused voluntarily, and I therefore hold that Section 149 makes all the appellants guilty under Section 325.

"It is next contended that a double sentence under separate convictions is contrary to the first clause of Section 71, and on this point reliance is placed on 16 C. 442. Section 71 is inapplicable to the case. There were entirely distinct offences under Sections 147 and 325. If it were held that the offence for which they have been punished under Section 325 was partly made up of the offence under Section 147, still according to the more recent decision of the Bombay High Court in 17 B. 260 separate sentences could be passed for the two offences, provided the punishment does not exceed the maximum prescribed for Section 325.

"The correctness of 16 C. 442 has been doubted by Sir Meredyth Plowden in 31 P. R. 1894."

(viii) *Jafir Khan v. Empress*, 32 P. R. 1885:

"Accused was found guilty of rioting, being armed with a deadly weapon, and also of causing grievous hurt by means of this weapon, and was sentenced to separate sentences for each offence."

It was held that as the acts constituted two offences of a different character, though committed in the course of the same transaction, each is separately punishable (7 A. 29 followed).

(ix) *Nur Khan v. Queen-Empress*, 31 P. R. 1894 :

Accused had taken part in a riot in which they were armed with sticks and had caused five casualties among the persons they attacked. They were charged jointly under Section 325 with causing hurt to certain persons and with rioting under Section 147. Having been convicted under both sections, and having received separate sentences for each offence, they appealed to the Chief Court on the Revision side, and it was contended on their behalf that by reason of Section 71 they were not liable to more than one punishment, the offence of rioting being by the aid of Section 149 a part of the offence for which they were punished under Section 325.

It was held, distinguishing 16 C. 442, that inasmuch as each offender might have been convicted of the offence of hurt under Sections 323 and 325 by reason of the act done by him individually, and further as each of them might have been convicted under Sections 149 and 323 and 149 and 325 by reason of an act not done by him individually, the sentences were not contrary to Section 71.

"I need not express an opinion on this occasion upon 16 C. 442, because the facts found distinguish the present case. In that case.....it was held that the rioting under Section 148 was part of the offence under Sections 149 and 324, the petitioners not having taken part in causing the hurt which was caused voluntarily by other members of the assembly. It is not at present clear to my mind how armed rioting by A, B and C is part of the offence committed by D and E and imputable to A., B and C as members of the same assembly, but in which A, B and C took no share."

(x) *Bhagwan Singh v. Empress*, 4 P. R. 1901 F. B.:

When the offence of rioting has not been completed until the grievous hurt is caused, or, in other words, when the causing of the grievous hurt is itself the form of violence which with other circumstances constitutes the offence of rioting, we are clearly of the opinion that separate sentences cannot be imposed, and this would be the case not only as regards those persons who did not actually cause the hurt, but also the actual causer of it.

But we are not prepared to go so far as to hold as a general proposition that separate sentences passed upon persons for rioting and grievous hurt are necessarily illegal where it is found that such persons did not individually commit any act amounting to voluntarily causing hurt, but were guilty of that offence under Section 149. That view appears to have been accepted by a Full Bench of the Calcutta High Court in 16 C. 442 ; no doubt in many cases separate sentences would be illegal, but it seems to us quite possible that cases may occur in which after the offence of rioting has been established owing to the use of force or violence, and all the members of an unlawful assembly have been rendered liable for that offence, one or more persons may proceed to further acts of violence, such as causing grievous hurt or homicide, and we do not see why others, who remain members of an unlawful assembly during the later phases, may not be held guilty in addition to the previously completed offence of rioting, and be punished separately for each offence."

(Followed in 31 P. R. 1916, 161 P. L. R. 1911).

(xi) *Ala Dya v. King-Emperor*, 5 P. R. 1906.

When two parties are arrayed against each other in a riot, it cannot be truly predicted that the offence of rioting was committed by both the parties in the same transaction.

Obviously the offence of rioting committed by each side forms a separate transaction, and Section 239 would be entirely inapplicable (15 P. R. 1882, 20 C. 537). According to the last authority quoted, the irregularity in the trial might be condoned under Section 537; but this view is not apparently maintainable in the light of more recent cases, especially the Privy Council judgment in *Subrahmania Ayyar v. King-Emperor*, 25 M. 61.

But even though a trial be altogether illegal and void, the High Court is not bound under Section 439 to set aside the conviction where no prejudice is shown to have been caused by the irregularity.

(xii) *Gowardhan Das v. King-Emperor* 38 P. W. R. 1907
= 6 Cr. L. J. 446.

In a trial for rioting the charge is bound to state the common object of the assembly, but if it does not, the omission is not fatal to the conviction if the accused have in no way been prejudiced ; but when as in this case, it is shown that the

omission to state in the charge of rioting the time and place and the common object has prejudiced the accused in their defence, the conviction is liable to be set aside.

Held also that where an offence forms an ingredient of the offence of rioting, the rioters cannot be punished both for rioting and the other offence; so where the common object of an unlawful assembly was to assault the Police officers in the discharge of their duty, and hurt was actually caused to some of them, separate sentences under Sections 147 and 332 were disallowed, and sentences under Section 332 only were maintained.

(xiii) *Masti v. Crown*, 3 P. R. 1911.

M and two B's came up accompanied by the other appellants (who kept in the background), and the three former entered the enclosure where L and his party were sitting and violently assaulted L, and thereafter all the appellants proceeded to assault the other friends of L who were coming up. The common object was to prevent by force the demarcation of boundaries; they all went armed with *dangs* and *lathis* and everyone of them must have known that M and the two B's when they entered the enclosure would assault L. All the appellants were, therefore, guilty of rioting, and must be held responsible for the offence of causing grievous hurt, inasmuch as they knew that M and the two B's had entered the enclosure armed with *lathis* with the intention of committing an assault on L. We consider the convictions of the other appellants fully justified under Sections 149 and 325 as regards both the assault on L and his party and the subsequent assault on F K and others.

M and the two B's were sentenced under Sections 325 and 149 for assault on F K and others; this sentence was upheld, and under Sections 304 (first part) and 149 as regards the assault on L.

This sentence was changed to one under Section 304 (second part).

(xiv) *Fauja Singh v. King Emperor*, 55 P. L. R. 1911 = 10 P. W. R. 1911 = 12 Cr. L. J. 178 = 10 Ind. Cas. 643.

B went to the Police Station to report an assault against F and others. The Police declined to take action. F with his companions went to the house of B evidently with the intention of taunting her with her failure to obtain any satisfaction from the Police.

A, tenant of B, who was at B's house, picked up a stick and came out, abusing and threatening the intruders. F struck the tenant one severe blow with a *chivvi*, from which he died.

It was held that F was rightly convicted under the first part of Section 304, but his companions must be acquitted, for none of them took any part in any assault at B's house.

Their going to B's house and calling out that she had got nothing by going to the Police Station could not make them members of an unlawful assembly.

(xv) Hardit Singh *v.* Emperor, 161 P. L. R. 1911=12 Cr. L. J. 236=10 Ind. Cas. 278.

Appellants, five in number, were driving some cattle belonging to some canal officials to the pound. The owners tried to rescue the cattle, but failing started to write down the names of the accused. The accused got excited and attacked their pursuers, hurting two of them.

It was held that as an unlawful assembly becomes guilty of rioting when violence is used, and in this case the unlawful assembly rioted when two of the pursuers were attacked, the members of it cannot be convicted and sentenced separately for rioting and causing hurt (following 4 P. R. 1901).

(xvi) Radha Kishen *v.* Crown, 7 P. W. R. 1912=67 P. L. R. 1912=15 Ind. Cas. 316=13 Cr. L. J. 476.

Persons by simply passing close to the village of their enemies cannot be convicted under Section 143.

(xvii) Emperor *v.* Chanda Singh 2, P. R. 1913.

It is not the duty of the police, nor is it within their province, to determine in the case of riot which of the parties concerned was in the wrong.

(xviii) Mihan Singh *v.* Crown, 26 P. R. 1914.

M S and his party were ploughing certain disputed land when members of complainant's party came up to interfere with them and to turn them out.

As the members of the deceased's party were the aggressors, their object being to dispossess the other party from the land, M S's party were perfectly justified in exercising their right of private defence; and if M S exceeded that right, he and he alone was guilty of the offence, and Section 149 did

not operate to make M S's companions equally guilty with him, as they were not at the time members of an unlawful assembly.

(xix) *Agra v. Crown*, 37 P. R. 1914.

The Code does not give any right of private defence of property in regard to which an offence under Sections 403 and 411 has been committed.

Twenty-six appellants went in a body to M's *haveli* with the object of recovering the buffalo which H claimed, and himself believed to be his. They did, in fact, recover the buffalo, and after they had gone some distance, they were followed by M and A, and then some abuse was given by either side, and four of the appellants turned back and beat them. The other appellants took no active part in the beating.

It was held that the convictions under Sections 304 and 149 could not be upheld, as the offence was not committed in prosecution of the common object of the assembly, nor was it such as the members of that assembly knew to be likely to be committed in prosecution of that offence. The common object of the assembly was to take away the buffalo, and when M and A came up to get it back, force was used by some of the appellants to drive them away. This force was used in prosecution of the common object, and all the appellants were therefore guilty of rioting.

(xx) *Dhian Singh v. Crown*, 16 P. R. 1915.

The members of a party setting out heavily armed for the purpose of committing a dacoity must have known that there was every likelihood of something occurring either on the way or at the scene of the dacoity to interfere with their criminal plans, and that the deliberate intention was to use their arms wherever necessary, either to effect the object in view, or to avoid the risk of capture; and therefore when some of the members of the party fired upon the police, which had stopped the party on the road, and killed two men, all were guilty of the offence of murder under Sections 149 and 302.

With all due respect we feel unable to follow the learned Judges of the High Court of Calcutta (39 C. 781) in their conclusion that the specific common object of a riot must necessarily be set out in a charge including Section 149. We can easily understand that it might be desirable to do so in a particular case, but we are not prepared to go further and lay down any such proposition of law on the point.

(xxi) *Mangal Singh v. Crown*, 31 P. R. 1916.

Held (following 4 P. R. 1901) that where the use of violence and the causing of hurt was the thing which turned the assembly of the accused into an unlawful assembly, and turned that unlawful assembly into a riot, separate conviction under Sections 147 and 325 were not justified.

(xxii) *Attar Singh v. Crown*, 9 P. R. 1918.

An illegal warrant of arrest was issued under Section 498. The Head Constable arrested the woman and was taking her away when a large concourse of people assembled, took away the woman from the custody of the police, and inflicted certain injuries on them. It was held that although resistance to the execution of the warrant might be held to be justifiable and Sections 332 and 225 not applicable, the causing of hurt was a necessary incident to the rescue, and therefore formed a part of the common object, and the accused were guilty of an offence under Section 147.

(xxiii) *Sikandar v. Crown*, 36 P. R. 1918.

The appellants, who deliberately armed themselves and collected at a well, knowing full well that owing to what had occurred already, and also seeing the opposite party collected at a well 65 karms away, a fracas was imminent, and though the Police Station was only a mile away, and they had ample time to send word to the police and claim the assistance of the public authorities, yet refrained from doing so, being apparently eager for the fight, could not set up the right of private defence merely because the other party made the first advance (*vide* 99, third), 35 C. 368 followed.

(28 M. 454 approved in so far as it held that the law imposed no duty on the persons assaulted to continue to retreat indefinitely, but distinguished in that in this case the appellants deliberately armed themselves and did not have recourse to the public authorities).

F. Patna.

(i) Fouzdar Rai v. Emperor, 3 Pat. L. J. 419 = 4 Pat. L. W. 111 = 1918 Pat. 254 = 19 Cr. L. J. 241 = 44 Ind. Cas. 33.

In Kabiruddin v. Emperor, 35 C. 368, and Maniruddin v. Emperor, 35 C. 384, there was an obvious point which deprived the accused of the right of private defence. They had in the one case committed and in the other case provoked an attack by the other side. But because of these decisions it seems to be the opinion of many Courts below and of all Police officers that there can be no right of private defence if there has been a riot. This is not the law. The right of private defence extends to Section 141, and subsequent sections just as much as it extends to any other offence. When a person in possession of property sees an actual invasion of the right to that property, if that invasion amounts to an offence under the Code, he is entitled to resist it by force, and to collect for that purpose such numbers and such arms as may be absolutely necessary for this purpose, provided only that there is no time to have recourse to the protection of the public authorities.

The facts were that the complainant's party were peacefully cutting their crops when they were attacked by the accused.

(ii) Khidir Bux v. Emperor, 3 Pat. L. J. 636 = 49 Ind. Cas. 171.

When an attachment warrant is not sealed with the seal of the Court, it is not an offence to resist the attachment, and a charge of rioting cannot be sustained.

(iii) Harinder Singh v. Emperor, 2 Pat. L. J. 541 = 18 Cr. L. J. 911 = 42 Ind. Cas. 143 (1917).

A conviction under Section 148 is not invalidated by reason of the charge containing no specific allegation of any common object if from the evidence it can be clearly established what the common object was.

If two common objects are alleged, and one is clearly proved upon the evidence, then the fact that the other common object has not been proved will not exonerate the accused from liability.

(iv) Jadubar Singh v. Emperor, 52 Ind. Cas. 494 (1919).

The alleged common object of an assembly which renders it unlawful must be established by evidence; it is not a matter

that can be inferred. In the absence of a clear finding as to how a fight originated, a conviction for rioting cannot be maintained.

(v) *Mahesh Dutt Singh v. Emperor*, 54 Ind. Cas. 773 (1920).

In the absence of a finding as to the existence of an unlawful assembly, a conviction under Section 147 cannot be maintained.

"The learned Vakil cited the case of *Poresh Nath Sircar* (33 C. 295), where, however, the common object *found* differed from the common object charged against the accused. In this case there is no finding as to the existence of an unlawful assembly in either judgment which satisfies the requirements of the law."

(vi) *Pertap Rai v. Emperor*, 56 Ind. Cas. 231. (1920).

If an accused person is charged under Section 325 read with Section 149, he cannot be convicted of the substantive offence under Section 325 (following *Jatindra Nath Chatterjee v. Emperor*, 34 C. 698).

G. Burma.

(i) Queen-Empress v. Nga Shwe, I. B. R. 1872 = 1892, 275.

In the case of a riot and fight between two opposing factions, the members of each party cannot be tried together in one trial on a charge under Section 147.

(ii) Queen-Empress v. Nga Aung Nyun, I L. B. R. 56.
Ditto

(iii) Nga Kyaw Yaung v. King-Emperor, U. B. R. 1905,
21 = 12 Bur. L. R. 37 = 2 Cr. L. J. 832.

The accused conducted a general procession along a public road, which they had a perfect right to go along, but some of the members of the party used threatening and abusive language. It was held that if they had simply taken their procession along, whether with or without the object of vindicating their right of way, without uttering threats, they would not have constituted an unlawful assembly; but that as there was evidence in the case that the party, or some of them, uttered threats and abuses, they did constitute an unlawful assembly.

H. Other rulings.

(i) Queen v. Hurgobind, 3 N. W. P. 174.

When the facts established proved that the accused engaged in deadly riot armed with deadly weapons, and that in prosecution of the common object of the assembly one man was killed and several severely wounded, it was held that the accused were liable to be convicted of all the offences of rioting armed with deadly weapons and culpable homicide and grievous hurt.

(ii) Raghunandan v. King-Emperor, 15 O. C. 183 = 15 Ind. Cas. 972 = 13 Cr. L. J. 556 (1912).

When it was found that G, a member of an unlawful assembly, was felled to the ground at the outset, and was left lying unconscious on the spot when the fight started while the remaining members of G's party pursued the persons one of whom had knocked down G, and having overtaken them committed the offence of culpable homicide, it was held that G, who was lying unconscious, could not be considered a member of the unlawful assembly at the time the offence of culpable homicide was committed, and was therefore not liable to conviction on this charge.

(iii) Inperator v. Khamiso, 6 S. L. R. 101 = 17 Ind. Cas. 408 || 13 Cr. L. J. 776 (1912).

The word "knew" in Section 149 indicates a state of mind at the time of the commission of the offence and not knowledge acquired in the light of subsequent events.

(iv) Mahpal Singh v. King-Emperor, 17 O. C. 184 = 15 Cr. L. J. 625 = 25 Ind. Cas. 633 (1914).

The applicants were convicted under Section 147 of being members of an unlawful assembly, and under Sections 324 and 149 by reason of hurt caused by one of them, and were sentenced to separate terms of imprisonment in respect of both these offences. It was held that the sentences were legal.

GENERAL REMARKS.

The most common form of riot case is that resulting from a riot about land whose ownership is disputed.

In nearly all these cases the question of the right of private defence of property arises. Under Section 97, secondly, every person has a right, subject to the restrictions contained in Section 99, to defend the property, whether moveable or immoveable, of himself or of any other person against an act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit these offences. Under Section 99, third, there is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities; and under Section 99, fourth, the right of private defence in no case extends to the inflicting of more harm than is necessary for the purpose of defence.

Under the 4th clause of Section 141 an assembly is an unlawful assembly if the common object is by means of criminal force or show of criminal force to enforce a right or supposed right. This phrase has been distinguished by the Calcutta High Court from "maintaining a right," and it has been held that the phrase "to enforce a right" can only apply when the party claiming the right has not possession over the subject of the right (17 C. W. N. 1132, 23 W. R. Cr. 25, 24 C. 686). In 4 P. R. 1889 Plowden, J., dissented from the general proposition; he wrote that the fact that the persons who assemble in force are in possession of a right in or over property, which property is threatened with attack by others, and which they endeavour to defend, is always an important point in a case of rioting, as suggesting that the members of an assembly may be entitled to the benefit of the exemption as to the right of private defence; but the importance of this simple fact may be, and is often, exaggerated.

If the attacked party are in peaceful possession of land, and are attacked while they are sowing or working on the land, then it is undoubted that they have a right of private defence. The Calcutta High Court has gone one step further in the oft-quoted case of *Pachkauri v. Queen-Empress*, 24 C. 686, and has held that if land has been found by the Court to be in possession of a party, and that party hears that the other side is about to take forcible possession, they are allowed to go upon the land armed and in large numbers;

and that if they are then attacked, they are entitled to the right of private defence, as they are entitled to take such precautions as they think are required, and to use such force or violence as is necessary, to prevent aggression. This ruling was followed in the case of *Fateh Singh v. Emperor*, 41 C. 43, in which the facts were similar; and in *Poresh Nath Sircar*, 33 C. 295, and in *Silajit Mahto v. Emperor*, 36 C. 865, 41 C. 43 was followed by the Madras High Court in *Sambo Pillai*, 2 M. W. N. 213.

The Allahabad High Court did not approve of the ruling in Pachkauri's case in *King-Emperor v. Kaliji*, 24 A. 143, but the facts were not similar.

The Calcutta High Court has also held that no right of private defence arises when a large body of men come armed and prepared to fight to enforce a right or supposed right (see 35 C. 384, 26 C. 574, 35 C. 368, 1 C. L. R. 521); although it would appear from *Chandulla Sheikh v. King-Emperor*, 18 C. W. N. 275, and *in re Sambo Pillai*, 2 M. W. N. 213, that the Calcutta and Madras High Courts are prepared to go further than the Allahabad High Court and allow the right of private defence to a party rightfully entitled to the land attacking another party who has temporarily taken forcible possession, though no actual damage is being done. In the Calcutta case it was certainly held that there was no time to have recourse to the public authorities, although the opposite party were only erecting huts; in the Madras case the opposite party were only ploughing the land, and such a case was specially distinguished by the Allahabad High Court in *Jageshwar Rai's case* (15 A. L. J. 47) as a case in which there is ample time to have recourse to the public authorities.

In the Bombay case, *Queen-Empress v. Narsang Pathabhai*, 14 B. 441, complainants had taken forcible possession of land during the night and were ploughing up seed which had been sown, and attacked the accused's party when they went in force to the spot to remonstrate. The complainant's party commenced the attack in that case, but it was also held that the accused's party had a right of private defence of property.

The following principles are suggested as general guides in dealing with cases in which one party has been in lawful or peaceful possession:—

(1) If the party in possession expects an attack, they are entitled to take all reasonable measures to prevent or resist

such an attack ; and such preparations will not render them an unlawful assembly if they are attacked and defend their property.

(2) If the party in possession sees the other party taking forcible possession of their property and doing actual damage, e.g., by cutting crops or ploughing up seed, they are entitled to take immediate action to defend their property. Generally also they would be justified in immediate action if they anticipated that actual damage would be done to their property before they could call in the assistance of the public authorities.

(3) But if no actual damage is being done by the party who has taken forcible possession, and there is no reason to anticipate that actual damage will be done before recourse can be had to the public authorities, then there will be no right of private defence, and the party entitled to possession will not be justified in taking the law into their own hands.

The right of private defence, however, cannot be pleaded in cases where there has not been actual possession, e. g., where two parties claim title to certain trees, and one party goes to cut the trees armed with *lathis* with the intention of resisting anticipated opposition (24 A. 298), or when a party goes fully armed to repair an embankment (35 C. 368); nor in cases where there is a dispute as to title and neither party has been in undisturbed possession, and one party goes to the land and starts to cultivate it accompanied by a band of men armed with *lathis*, who keep off the opposite party by brandishing the *lathis*. In such a case there is time to have recourse to the public authorities (9 C. 639). If, however, one of the parties claiming title to the land is ploughing it peacefully, then they have a right of private defence against the attack of the party of the claimants (26 P. R. 1914), and a party entitled to joint possession, but out of possession, has no right to collect armed men and take forcible possession (11 C. W. N. 176).

Nor is there any right of private defence against a civil trespass, e.g., when the opposite party are repairing or erecting or cutting a bund across a river, especially when there is no pressing or immediate necessity of a kind showing that there was not time to have recourse to the protection of the public authorities (Ganouri Lal Das *v.* Queen-Empress, 16 C. 206 ; Emperor *v.* Ambika Lal, 35 C. 443).

The principle enunciated in 16 C. 206 was followed in 26 C. 574, wherein the accused's party claiming a right to

fish in a tank had gone to the tank armed with *lathis*, and injured some of the other party who came to protest.

In all cases of riots about land, it is of paramount importance to decide who was in actual occupation just before the occurrence (35 C. 103), although such occupation if it has been forcibly and wrongfully effected just before the riot would not give the occupants any right of private defence of property.

Persons exercising their right of private defence do not become members of an unlawful assembly by repelling attacks made on them or by exceeding that right of private defence. If any person exceeds his right, he will be individually liable for any hurt caused (*Kunja Bhuiya v. Emperor*, 39 C. 896; *Penumetsa v. Emperor*, 44 Ind. Cas. 40 Madras). But an assembly might because unlawful if the members knowing that the right of private defence had been exceeded continued in it (36 C. 296).

It is impossible to classify all the cases which have been cited; each case must be decided on its own facts, and there is a large number of cases wherein the facts are peculiar.

The question of the amount of force that may be used to disperse an unlawful assembly is discussed in *Queen-Empress v. Subba Naik*, 21 M. 249.

Sections 154-156.

The following are the cases dealing with the liability of owners and occupiers :—

Queen-Empress v. Payag Singh, 12 A. 550.

Brae v. Queen-Empress, 10 C. 338.

Kazi Zeamuddin v. Queen-Empress, 28 C. 504.

Siva Sundari v. Emperor, 39 C. 834.

Harendra Lal Roy v. King-Emperor, 8 C. W. N. 908.

In re Radha Nath Chowdhry, 7 C. L. R. 289.

Section 153.

Cases dealing with Section 153, "provoking a riot," are — *Queen-Empress v. Kahanji*, 18 E. 758.

Emperor v. Khushal Singh, 23 A. W. N. 1886.

Emperor v. Hussain Bakhsh, 29 A. 569.

Abdullah v. Emperor, 17 A. L. J. 200.

Section 148.

When one member of an unlawful assembly is armed with a deadly weapon, the other members of the assembly cannot be convicted under Section 148 (read with 149). It is only the actual person so armed that can be charged under that section (*Sabir v. Queen-Empress*, 22 C. 276; *Harendra Chandra Sarkar v. Emperor*, 7 C. W. N. 512). *In re Choitano Ranto*, 16 Cr. L. J. 646 (Calcutta).

PROCEDURE.

1. Separate trials.

There must be separate trials of the opposing factions in a riot.

(28 A. W. N. 1881; 160 A. W. N. 1882; 26 P. R. 1881; 15 P. R. 1882; L. B. R. 1872-1892, 275; 1 L. B. R. 56).

If opposing factions are tried in one trial, this is not an irregularity which can be condoned, but even though a trial be altogether illegal and void, a High Court is not bound to set aside the trial on revision (5 P. R. 1906).

2. Charge and finding about common object.

In 21 C. 955 it was held that when there are two alternative common objects in the charge, and the verdict of the Jury leaves it in doubt as to what was the common object which actuated the accused, the verdict is bad. A similar finding was given in 22 C. 276, where there were two possible common objects, and there was no *clear* finding which had been accepted. In 33 C. 295 the judgment of the Magistrate contained no finding what the common object of the assembly was, and the facts found by the Sessions Judge completely negatived the common object set out in the charge, which was not stated with due precision.

These last two cases were distinguished in 36 C. 158, where it was found that when the common object of an unlawful assembly was stated in the charge to be to enforce a right or supposed right, and there was no dispute as to the common object in the lower courts, which did not therefore discuss the question or come to any express finding on the point, they had impliedly found the common object to be the same as stated in the charge, and the accused had in no way been prejudiced.

In 36 C. 865 it was held that the question was whether the common object established agreed in essential particulars with that laid down in the charge; and that it is not a general proposition of law that a conviction under Section 147 cannot be supported where the common object as stated in the charge is not precisely made out. This principle had been adopted in 35 C. 384, wherein the accused had been charged with rioting with intent to dispossess the complainant, but the Appellate Court had thought the question of possession not clear, and found them guilty of rioting with the intention of enforcing their rights or supposed rights; it was held that both

the common objects raised the same question and the accused had not been prejudiced.

But (23 C. W. N. 693) where the common object alleged in the charge is not established, and there is no alternative, there can be no conviction for rioting.

In 39 C. 781 it was stated that in cases of rioting the common object should be stated in the charge, but the omission to state it does not vitiate a conviction if there is evidence on the record to show it. It was further held, however, that in a charge under Section 149 it was obligatory to set out the common object.

The principle laid down in the first part of this ruling was followed also by the Punjab Chief Court in 38 P. W. R. 1907, but it was added therein that if the accused have been prejudiced in their defence by the omission to state in the charge the time and place and the common object, the conviction is liable to be set aside.

The second portion of the Calcutta ruling was, however, dissented from by the Punjab Chief Court in 16 P. R. 1915, when the Judges held that, though it was desirable to set out in a charge including Section 149 the specific common object of a riot, they were not prepared to go further and lay down any such proposition of law on the point as had been laid down in 39 C. 781.

The Patna High Court has held (2 Pat. L. J. 541) that a conviction under Section 148 is not invalidated by reason of the charge containing no specific allegation of any common object if from the evidence it can be clearly established what the common object was. If two common objects are alleged, and one is clearly proved, then the fact that the other common object has not been proved will not exonerate the accused from liability. That Court has further held that the common object must be proved and cannot be inferred (52 Ind. Cas. 494), and that there must be a finding as to the existence of an unlawful assembly (54 Ind. Cas. 773).

When accused are charged under Sections 325 and 149, but are acquitted of rioting, all offences which they are charged of having committed by implication disappear, and the defence cannot be called upon to answer to the specific act of causing grievous hurt simply because it may have appeared in the evidence (16 C. W. N. 1077); and when the charge is under Sections 325 and 149 there cannot be a conviction under Section 315 (56 Ind. Cas. 231, Patna).

If the accused are charged in the Lower Court of rioting only, the Sessions Judge is not authorised to convict under Section 323 or 353 (30 C. 288, 18 C. W. N. 1274, 18 C. W. N. 1276), but a High Court on revision has power to alter a finding of rioting into one of murder (37 M. 119).

Separate and Cumulative Sentences :—

Section 71 of the Penal Code.

A Full Bench of the Bombay High Court held in 17 B. 260 that when a prisoner is convicted of rioting and hurt, and the conviction for hurt depends on the application of Section 149, it is not illegal to pass two sentences, one for riot and one for hurt, provided that the total punishment does not exceed the maximum which the Court might pass for any one of those offences. When, however, the accused is guilty of rioting, and is also found to have himself caused the hurt, he may be punished both for rioting and for hurt, and in such a case the total punishment may legally exceed the maximum which the Court might pass for any one offence.

The principle enunciated in the second portion of this ruling has been followed also by the Allahabad High Court in 39 A. 623, which followed the F. B. ruling 7 A. 757, wherein it was held that when certain of the rioters commit individual acts of violence with their own hands, which establish distinct offences of causing hurt separate from and independent of the offence of rioting which is already completed separate sentences are not illegal.

In 6 A. 121 it had been held that a riot is part of the other offences, the force or violence incident to their commission converting what would otherwise have been a mere unlawful assembly into a riot. This ruling was dissented from in 7 A. 29 and 9 A. 645. In the latter ruling it was held that members of an unlawful assembly other than those who committed the individual acts of violence may be separately punished both for rioting and for causing hurt, and that Section 71 had no application. This ruling differs from the first portion of the Bombay ruling 17 B. 260.

The first Calcutta ruling was 11 C. 349, wherein it was held (following 7 A. 29) that inasmuch as it had not been found that the causing of hurt was the force or violence which alone constituted the rioting, Section 71 did not apply and the

separate sentences were legal. It was remarked in that ruling that had it been found that the causing of the hurt was the force or violence which alone constituted the rioting, the Judges would be prepared to hold that the accused could not be punished both for causing hurt and for rioting. This was the theory which had been suggested by 6 A. 121, but not apparently subsequently accepted by the Allahabad High Court.

In 16 C. 442 a Full Bench overruled 11 C. 349, and held that separate sentences for rioting and causing hurt are not legal when it is found that such persons did not individually commit any act which amounted to voluntarily causing hurt, but were guilty of that offence only under Section 149. This is contrary to the Allahabad ruling 9 A. 645. 16 C. 725 dealt with the liability of a rioter for the acts committed by himself and 16 C. 442 was therefore distinguished. The *obiter dictum* in 11 C. 349 was referred to, but was neither approved nor dissented from, as it was found that the offence of rioting was committed before the blows were struck.

In 19 C. 105 it was held that as resistance to the Police was one of the component parts of the offence of rioting of which the accused had been convicted and sentenced to the maximum punishment provided by Section 148, and having regard to the provisions of Section 71, the additional sentences under Section 152 were illegal. But it was held that separate sentences under Sections 332 and 148 were not illegal, Section 71 not being applicable to such a case; and that when a particular person causes hurt in the course of a riot, he may be punished both for causing the hurt and for taking part in the riot. This ruling was followed in 40 C. 511, and in 41 C. 836 it was held as follows:—"The rulings of this Court have for a long series of years been to the effect that separate sentences should not be passed upon people guilty of rioting for the offence which is specifically stated to have been the common object of the assembly, unless, as has been held in several cases, a specific charge is laid against the individual of committing such offence". Two other rulings of the Calcutta High Court on this subject are 4 C. W. N. 245, and 8 C. W. N. 344. In the former it was held that separate sentences under Sections 147 and 353 should not be passed when the common object of the unlawful assembly committing the riot was the offence under Section 353; in the latter ruling it was held that it is illegal to pass separate sentences for rioting and hurt upon persons who are not proved to have individually caused hurt, but are guilty of those offences under Section 149.

The Madras High Court has recently dealt with this question in *Krishna Ayyar v. Emperor*, 24 M. L. T. 96=526 M. W. N. 1918=49 Ind. Cas 337 :—“ It has been well settled that when the object of an unlawful assembly is to cause hurt, then a member of that unlawful assembly, if he is convicted under Section 147, cannot be convicted also under Sections 323 or 325 read with 149, except that such of the accused as are proved themselves to have caused hurt in the riot would be rightly convicted of the offence of hurt in addition to the offence of rioting.

The Punjab Chief Court in 8 P. R. 1895 noted that the correctness of 16 C. 422 had been doubted in 31 P. R. 1894, and that offences under Sections 147 and 325 were distinct, and that Section 71 was not applicable. It was added, however, that even if the offence under Section 325 was partly made up of the offence under Section 147, still according to 17 B. 260 separate sentences could be passed for the two offences provided the punishment did not exceed the maximum prescribed for in Section 325.

The question was discussed by a Full Bench in 4 P. R. 1901, and therein it was held that when the offence of rioting is not completed till the hurt is caused, or, in other words, when the causing of the hurt is itself the form of violence which with other circumstances constitutes the offence of rioting, separate sentences cannot be imposed, and this is the case not only as regards these persons who did not actually cause the hurt, but also as regards the actual causer of it. This goes further than the Calcutta and Madras rulings, wherein it was held that in such cases the individual causer of the hurt can be separately punished.

It was further written in this Full Bench ruling that the Judges were not prepared to hold as a general proposition, as had been held in 16 C. 422, that separate sentences passed for rioting and hurt are necessarily illegal when it is found that such persons did not individually commit any act amounting to voluntarily causing hurt, but were guilty of that offence under Section 149. No doubt, it was held in many cases separate sentences would be illegal, but cases may occur in which after the offence of rioting has been established owing to the use of force or violence, and all the members of the unlawful assembly have been rendered liable for that offence, one or more persons may proceed to further acts of violence such as causing hurt or homicide, in which case there is no reason why others, who

remain members of the unlawful assembly during the later phases, should not be held guilty in addition to the previously completed offence of rioting, and be punished separately for each offence.

This ruling was followed in 161 P. L. R. 1911 and 31 P. R. 1916, and it was again held that when the use of violence and the causing of hurt was the thing which turned the assembly into an unlawful assembly, and turned that assembly, into a riot, separate convictions under Sections 147 and 325 are not justified.

To sum up :—

(1) Separate convictions for rioting and hurt of persons who did not individually cause the hurt, but are guilty of that offence under Section 149.

The Bombay High Court has held that Section 71 is applicable and that separate sentences are not illegal, provided that the total punishment does not exceed the maximum that may be passed for one of the offences.

The Allahabad High Court (9 A. 645) has held that Section 71 has no application to such a case, and that other persons than those who committed the individual act of violence may be separately punished for the two offences.

(This was held also by the Oudh Court in 17 O. C. 184.) It was added in 9 A. 645 that even assuming that Section 71 applies, if the terms of imprisonment do not exceed the maximum punishment provided for either of the offence, separate sentences will not be illegal. In Dharmdev Singh v. Emperor, 14 A. L. J. 738 = 17 Cr. L. J. 418 35 Ind. Cas. 978, which purported to follow 9 A. 465, it was definitely held that separate sentences may be passed, provided the sentence ultimately passed does not exceed that provided in Section 325.

The Calcutta High Court (16 C. 422) has held that in such cases separate sentences are not legal.

The Punjab Chief Court (4 P. R. 1901) has neither accepted the Calcutta theory nor the Allahabad theory in their entirety, and has held that though there may be cases where separate sentences would be illegal, there might be cases in which they would be legal.

(2) Separate convictions for rioting and hurt, when it is the causing of hurt that was the offence which turned the unlawful assembly into a riot.

The Allahabad High Court is not very clear on this point, but 6 A. 121, where it was held that in such a case separate sentences are illegal, was dissented from in subsequent rulings.

The Calcutta and Madras High Court have held that none but the individual causer of the hurt can in such cases be separately convicted; and the Punjab Chief Court has held that no one, not even the individual causer of the hurt, can be separately convicted.

CHAPTER VIII.

DEATH OR HURT IN ROBBERY, DACOITY, AND BURGLARY.

Section 390. Theft is "robbery" if in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender for that end voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death, or of instant hurt, or of instant wrongful restraint.

391. When five or more persons conjointly commit or attempt to commit a robbery, or where the whole number of persons conjointly committing or attempting to commit a robbery, and persons present and aiding such commission or attempt amount to five or more, every person so committing, attempting or aiding is said to commit dacoity.

392. Whoever commits robbery shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine; and if the robbery be committed on the highway between sunset and sunrise, the imprisonment may be extended to fourteen years.

393. Whoever attempts to commit robbery shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

394. If any person in committing or attempting to commit robbery voluntarily causes hurt, such person, and any other person jointly concerned in committing or attempting to commit such robbery, shall be punished with transportation for life, or for rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

395. Whoever commits dacoity shall be punished with transportation for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

396. If any one of five or more persons who are conjointly committing dacoity commits murder in so committing dacoity, every one of those persons shall be punished with death or transportation for life, or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

397. If at the time of committing robbery or dacoity the offender uses any deadly weapon or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than seven years.

398. If at the time of attempting to commit robbery or dacoity, the offender is armed with any deadly weapon, the imprisonment with which such offender shall be punished shall not be less than seven years.

459. Whoever whilst committing lurking house-trespass or house-breaking causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, shall be punished with transportation for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

460. If at the time of the committing of lurking house-trespass by night or house-breaking by night any person guilty of such offence shall voluntarily cause or attempt to cause death or grievous hurt to any person, every person jointly concerned in committing such lurking house-trespass by night or house-breaking by night shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

It is beyond the scope of this book to discuss in detail the law of robbery and dacoity. We are concerned only with those cases of robbery and dacoity in which death or hurt is caused.

Theft is robbery under various conditions which do not involve the causing of hurt. Thus theft may be robbery because in committing the theft the offender attempts to cause hurt, or causes wrongful restraint, or fear of death, hurt or wrongful restraint. In none of these cases could a charge be framed under Section 394. Section 392 would be the only section applicable. But when the fact which transmutes theft into robbery is the voluntary causing of hurt, then, while Section 392 still applies, insomuch that a charge under that section should be framed, the Magistrate is not justified in disregarding the application of Section 394, and a charge of voluntarily causing hurt in committing robbery should be added under that section. The section imposes a specific penalty for

the specified act; and if there is *prima facie* ground for believing that the accused has committed the act, he should be charged with it.

(Crown *v.* Po Lon, 1 L. B. R. 232 1902.)

As an offence under Section 392 is necessarily included in an offence under Section 394, a person guilty under both sections can be convicted and sentenced only under Section 394.

(Queen-Empress *v.* Durga, Rat. Un. Cr. C. 511 1890.)

In a case where robbery was committed by four men, two, one of whom was the appellant, went from house to house bullying and ill-treating the inmates and making them give up their valuables, while the other two kept guard on the house tops ; of the latter pair one was armed with a gun which he fired off several times, and towards the close of the affair, when the villagers began to throw stones, he shot and killed one of them. The question was whether the appellant was liable for the act of his companion who shot the villager.

It was held that Section 34 was not applicable to the case, as the act which caused the death was not done by *several persons*, but only by one. In many such cases the difficulty of fixing responsibility on to all the gang does not arise, because such robberies are often committed by gangs of 5 or more men, and the Section 149 is applicable, a section which goes much further than Section 34, as it relates not merely to acts done in furtherance of the common object, but also to such acts as the offenders know to be likely to be committed in furtherance of that object. There is also Section 396, which lays down that if any one of 5 or more dacoits commits a murder in the course of the dacoity every one of the dacoits may be punished with death. Here, however, there were only four culprits, so neither Section 149 nor Section 396 can be applied.

In order to apply Section 111 it would have to be found (1) that the appellant was an abettor of the robbery, and (2) that the murder was a probable consequence of the abetment, and was committed in pursuance of the conspiracy to commit the robbery. It might be argued that when two or more persons jointly commit an offence, each of them is not merely a principal, but is also an abettor of his companions, since he is aiding them in the doing of the act. It was not, however considered necessary to decide this point, since it could not

be held that the murder was a probable consequence of the abetment to commit robbery. In a robbery of this kind, when there is no previous enmity of any sort, firearms are taken with the main object of frightening the villagers, and it is not the intention of the robbers to use the fire arms with deadly effect unless it should be necessary to do so in order to effect their escape. If the appellant and his comrades had been asked by a friend shortly before the robbery what were the odds on a murder being committed during the course of that robbery, they would have probably said the odds were against anybody being killed, and the answer would probably have been right. Many such robberies take place without any one being killed. No general rule, however, can be laid down as to probabilities in such cases ; every case must be judged on its own merits. It was held therefore that the conviction for murder could not be upheld by reason of Section 111, but that Section 394 was clearly applicable, and that the maximum sentence should be passed.

(*Harnam Singh v. The Crown*, 21 P. R. 1919).

In enacting Section 396 it was the intention of the Legislature that the sentence of death should sometimes be inflicted on a person convicted of taking part in a dacoity, in the course of which a murder is committed, even though there is nothing to show that he himself committed the murder or that he abetted it within the meaning of Section 107, I. P. C., or that he even knew that it was likely to be committed in prosecution of the common object of his comrades.

(*Empress v. Tantia Bhil*, 4 C. P. L. R. 1 Cr.)

The first essence of an offence under Section 396 is that the dacoity is the joint act of the persons concerned; and the second essence is that the murder is committed in the course of the dacoity in question (*King-Emperor v. Madura Thakur*, 6 C. W. N. 72, 1901). Murder committed by dacoits, when they were engaged in carrying off the stolen property, is murder while they were engaged in committing dacoity, and is therefore punishable under Section 396 (*Vitti Thevan*, 17 M. L. J. 118=5 Cr. L. J. 201, 1906). So when certain prisoners broke out of a Police guard, and after seizing the Police rifles and ammunition, etc., effected their escape, and one of them fired at a constable and killed him, the circumstances under which the shot was fired not being disclosed, it was held that the accused were rightly convicted under Section 396 (*Nga Kyaw v. Queen-Empress*, L. B. R. 1872—1892, 502).

But in a case where after the commission of a dacoity, in which the dacoits, being interrupted by the villagers, did not get any plunder and were attempting to escape, and one or more of them in order to facilitate their escape attacked and killed one of the pursuing party, it was held that Section 396 did not apply, but only the person or persons actually taking part in the killing were liable therefor.

(Emperor *v.* Chandar, 47 A. W. N. 1906 = 3 Cr. L. J. 294).

Similarly in a case where several persons were found endeavouring to break into a house, and some of them being armed used violence, but only in attempting to escape being arrested, it was held that as no robbery or dacoity was committed, they could not be convicted under Section 397 read with Section 511; but the conviction under Sections 398 and 399 were correct; and the accused might also have been convicted under Section 402 (Queen-Empress *v.* Beni, 23 A. 78).

In Queen-Empress *v.* Sakharam Khandu, 2 Bom. L. R. 325 (1900), where dacoity had been committed, and when retreating on the advent of the villagers in superior force one of the dacoits had killed a man, it was held that the retreat was a continuation of the dacoity, and murder must be taken to have been committed in prosecution of the common object of the assembly.

In Queen-Empress *v.* Umrao Singh, 16 A. 437 (1893), it was held that Section 396 is not a section creating a separate and distinct offence. It merely provides a particular punishment for those who conjointly commit dacoity in the course of which murder is committed; and that to establish a liability to the punishment provided by the section, it is necessary to prove that the person said to be liable was one of those who were conjointly committing dacoity, and was present when the act of murder in the dacoity was committed.

But in Queen-Empress *v.* Teja, 17 A. 86 (1895) it was held that it matters not when in the commission of a dacoity a murder is committed, whether the particular dacoit was inside or outside the house when the murder was committed, or whether the murder was committed inside or outside the house, so long only as the murder was committed in the commission of that dacoity. This latter ruling was followed in Chittu *v.* Empress, 4 P. R. 1900, wherein it was held that if a dacoit in the progress and in pursuance of the

commission of a dacoity commits a murder, all of his companions who are participating in the commission of the same dacoity may be convicted under Section 396, although they may have no participation in the murder beyond the fact of participation in the dacoity. And in *Emperor v. Girya*, 6 Bom. L. R. 248 it was held that it is not necessary for the prosecution to prove that the others expected that murder would be committed.

In order that Section 396 may be applicable, the offence committed must be murder and not merely culpable homicide not amounting to murder; therefore when in committing a dacoity the accused stuffed a cloth into the deceased's mouth in order to silence him and not with any idea of killing him, they must be convicted under Sections 304 and 395, and not under Sections 302 and 396. *In re Sengoda Goundan*, 18 M. L. T. 103 = 621 M. W. N. 191516 Cr. L. = J 614 = 30 Ind. Cas. 438 (1915).

There has been some conflict of opinion as to whether Section 397 can be applied to all the members of the gang. It is noticeable that Section 394 renders all persons jointly concerned in committing a robbery liable to enhanced punishment if any of them causes hurt, whereas the phraseology of Section 397 is different. It was held in *Queen-Empress v. Mahabir Tiwari*, 21 A. 263, that the words "such offender" in Section 397 include any person taking part in the dacoity who, though he may not himself have struck the blow causing the grievous hurt, is liable for the act by reason of Section 34. This ruling was approved in *Chatar Singh v. Emperor*, 15 P. R. 1901, and *Crown v. Mohna*, 16 P. R. 1901. 21 A. 263 was, however, overruled in *Emperor v. Nageshwar*, 28 A. 404, wherein it was held that Section 397 applies only to the actual person or persons who at the time of committing robbery or dacoity may use any deadly weapon or may cause grievous hurt to any person, or may attempt to cause grievous hurt to any person. This ruling followed *Queen-Empress v. Senta*, 186 A. W. N. 1899 (= 28 A. 404. Note), and the same principle has been enunciated in *Komali Viswassan*, 1 Weir 450 = 2 Weir 515; *Emperor v. Bhura Ahir*, 16 C. P. L. R. 97; *Po Win v. Emperor*, 7 L. B. R. 26 = 20 Ind. Cas. 416 = 14 Cr. L. J. 432.

Section 397 does not prescribe a separate offence, but is merely a rider providing a minimum sentence in certain cases, and the accused should be charged with the offence of robbery or dacoity, as the case may be, coupled with Section 397 (15 P. R. 1901). The offence of voluntarily causing hurt of either

description in committing or attempting to commit a robbery is punishable under Section 394. (16 P. R 1901).

In Harnaman *v.* Queen-Empress, 6 P. R. 1901, the question was discussed whether "causes grievous hurt" in Section 397 means "commits the offence of grievous hurt" or not. It was considered that as Sections 397 and 459 have never contained the word "voluntarily," there is no reason for importing that word into the sections merely because it appears in other sections, or because the offence punishable under Section 325 is that of "voluntarily causing grievous hurt."

The question was not, however, finally decided because it was found that hurt amounting to grievous hurt was caused by an act in itself an offence done in furtherance of the intention to rob and at the time of committing robbery, and therefore Section 397 applies.

The accused had struck a woman in order to steal the horse on which she was riding, causing her to fall to the ground; it was held that Section 397 was applicable whether the fracture of the arm was caused by a blow or by the fall on the ground inasmuch as the accused caused the fracture by an act done in furtherance of his intention to steal the pony, and that act was itself an offence.

In Nga I. *v.* Emperor, 6 L. B. R. 41 = 16 Ind. Cas. 651, it was held that the word 'uses' in Section 397 should be construed in a wide sense so as to include carrying the weapon for the purpose of overawing the person robbed.

Section 398 applies only to cases of attempt to commit robbery or dacoity (Nga Shwe Waw *v.* Queen-Empress, L. B. R. 1872—1892, 280).

In a charge and finding under Section 398 the substantive Section 393 should be mentioned as well as the supplementary Section 398.

(Chan Hok *v.* Emperor, 12 Cr. L. J. 468 = 11 Ind. Cas. 1004).

In Lal Khan *v.* Crown, 19 P. W. R. 1912 = 17 P. L. R. 1912 = 13 Ind. Cas. 998 = 13 Cr. L. J. 182, it was doubted whether a *lathi* can be rightly described as a deadly weapon for the purposes of these sections.

Section 398 is applicable only to the actual person who is armed. (Queen *v.* Bhayja, Rat. Un. Cr. C. 797, 1895).

Sections 459 and 460 provide for a compound offence, the governing incident of which is that either "lurking house trespass" or "house-breaking" must have been completed in order to make the person who accompanies that offence, either by causing grievous hurt or attempting to cause death or grievous hurt, responsible under those sections. In other words, the causing of the grievous hurt or the attempt to cause death or grievous hurt must be done in the course of the commission of the offence of lurking house trespass or house-breaking, and at the time when it is being committed. The provisions of the section must be construed strictly, and it is not contemplated that when the principal action done by the accused persons amounts to no more than a mere attempt to commit the offences of lurking house trespass or house-breaking, the sections should be applicable.

(Queen-Empress *v.* Ismail Khan, 8 A. 649).

So where an attempt is made to break into a house at night, but the offenders are interrupted by the inmates, one of whom is killed, the offenders cannot be punished under Section 460, as the offence of house-breaking has been attempted only and not committed. (*Saifudin v. Crown*, 16 P. R 1874), and to support a charge under Section 459 or 460 the grievous hurt must be caused or the attempt must be made during the time that the house-breaking is being committed and not after that offence is completed and the offender has left the premises.

(17 P. R. 1876, *Imamuddin v. Crown*.)

This ruling was approved in *Jaffir v. Emperor*, 2 P. R. 1882, wherein it was held that the expression "at the time of committing house-breaking by night" must be limited to the time during which the criminal trespass continues which forms an element in the house trespass, which is itself essential to house-breaking, and cannot be extended so as to include any prior or subsequent time.

In a case where burglars had left the house on an alarm being raised, and in the courtyard one of them stabbed a man who tried to seize them, injuring him so that he died later on, it was held that the house-breaking by night was completed first, and then as a separate transaction grievous hurt was caused by a dangerous weapon, both accused being equally

liable under Section 34, but Section 460 did not apply, but Sections 457 and 458 and 326 applied. (*Sed Rasul v. Crown*, 27 P. R. 1916).

But in a case in which a house was invaded by a party of burglars, and the owner of the house seized one of the burglars as he was making his escape and in the scuffle in the dark was mortally wounded, it was held that the burglar could be convicted under Section 460.

The offence of burglary armed with a deadly weapon is itself a very serious one, and when to this is added the crime of a reckless use of the deadly weapon, no possible reason exists for giving anything but the maximum sentence. (*Harbans v. Crown*, 33 P. R. 1916).

Section 460 intended to provide for the punishment of persons who were jointly concerned in the committing of house trespass or house-breaking altogether irrespective of whether they were the persons who caused or attempted to cause death or grievous hurt. It never intended that if a person while he was committing burglary happened also to commit murder, he should be punished only for burglary and not for murder.

(*Chatur v. King-Emperor*, 8 A. L. J. 574=11 Ind. Cas, 570=12 Cr. L. J. 395, 1911).

CHAPTER IX.

ATTEMPTS TO KILL

307. Whoever does any act with such intention or knowledge, and under such circumstances that if he by that act caused death he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable either to transportation for life or to such punishment as hereinbefore mentioned.

When any person offending under this section is under sentence of transportation for life, he may, if hurt is caused, be punished with death.

ILLUSTRATIONS.

- (a) A shoots at Z with intent to kill him under such circumstances that if death ensued A would be guilty of murder. A is liable to punishment under this section.
- (b) A with the intention of causing the death of a child of tender years exposes it in a desert place. A has committed the offence defined by this section though the death of the child does not ensue.
- (c) A, intending to murder Z, buys a gun and loads it. A has not yet committed the offence. A fires the gun at Z. He has committed the offence defined in this section, and if by such firing he wounds Z, he is liable to the punishment provided by the latter part of the first paragraph of this section.
- (d) A, intending to murder Z by poison, purchases poison and mixes the same with food which remains in A's keeping. A has not yet committed the offence defined in this section. A places the food on Z's table or delivers it to Z's servants to place it on Z's table. A has committed the offence defined in this section.

308. Whoever does any act with such intention or knowledge that if he by that act caused death, he would be guilty of culpable homicide not amounting to murder, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both and if

hurt is caused to any person by such act, shall be punished with imprisonment for a term which may extend to seven years, or with fine, or with both.

ILLUSTRATION.

A, on grave and sudden provocation, fires a pistol at Z under such circumstances that, if he thereby caused death, he would be guilty of culpable homicide not amounting to murder. A has committed the offence defined in this section.

511. Whoever attempts to commit an offence punishable by this Code with transportation or imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code for the punishment of such attempt, be punished with transportation or imprisonment of any description provided for the offence for a term of transportation or imprisonment which may extend to one-half of the longest term provided for that offence, or with such fine as is provided for the offence, or with both.

There is a conflict of authority as to whether an attempt to murder, if the act done is one which does not fall within the purview of Section 307, can be punished under Sections 299, 300 and 511. The Bombay High Court has held that it can be so punished (*Reg v. Francis Cassidy*, 4 B. H. C. 17; 1867).

The Allahabad High Court, on the other hand, has held that it cannot. (*Queen-Empress v. Middha*, 14 A. 38=176 A. W. N. 1891).

The ratio decidendi of the Allahabad ruling is that Section 307 was meant to be exhaustive, and that no Court has any right to resort to the provisions of Sections 299 and 300 read with Section 511 for the purpose of convicting a person of the offence of attempted murder which, according to the view of the Court, does not come within the provisions of Section 307. The latter ruling is the more recent, but the former has the support of Mr. Mayne, who gives good reasons for preferring it. (*Jiwan Das v. King-Emperor*, 30 P. R. 1904).

In the Bombay case the prisoner was about to pull the trigger of a loaded gun, which, however, was not capped, though the prisoner believed it to be so when the gun was pulled from his hands. It was held that there was an attempt to murder, not under Section 307, but under Section 511, coupled with Sections 299 and 300.

In the Allahabad case the accused pointed a loaded pistol at a person to shoot him, and pulled the trigger. The cap exploded, but the charge did not go off. He was convicted under Section 307.

This judgment was delivered by Mr. Justice Straight. One of his reasons for the finding was that Section 511 is limited to cases punishable with transportation or imprisonment, and therefore attempts to commit murder, which is an offence punishable with death, cannot be included. In reply to this reasoning Mr. Mayne points out that the offence of murder is also punishable with transportation, and also that this reasoning, could not be applied to Section 308, which is in *pari materia* with Section 307 and worded in the same way, and can hardly admit of different treatment.

The second reason of Mr. Justice Straight was that Section 307 was intended to be exhaustive. Mr. Mayne's remarks are as follows:—"As to the second reason, it is, of course, clear that any attempt coming under Section 511, which is specifically provided for elsewhere must be dealt with under the express provision. For instance, an attempt to wage war against the Queen must be dealt with under Section 121. It is also quite clear that any attempt to commit culpable homicide, which falls under Section 307 or 308, must be dealt under them and not under Section 511. What the Bombay case decided was that an act done towards the commission of an attempt to murder, which was not an act by which murder could be effected, came under Section 511 because it did not come within Section 307. That being so, it fell within the wording of Section 511 as being a case where no express provision is made by this Code for the punishment of such attempt. According to Mr. Justice Straight such a case would go wholly unpunished.

The same judgment appears to express doubt as to the propriety of the Bombay ruling that the act done in that case, *viz.*, trying to discharge an uncapped rifle supposed to be capped, did not come within Section 307. "If he did all that he could do, and completed the only remaining proximate act in his power, I do not think he can escape criminal responsibility, and this because his own act, volition and purpose having been given effect to in there full effect, a fact unknown to him and at variance with his own belief, intervened to prevent the consequence of that act, which he expected to ensue, ensuing." But it may be submitted that the question is not whether the accused would escape crimin

responsibility—it was decided that he was liable under Section 511—but whether he would be criminally responsible under the very special words of Section 307. If that section only applies when the prisoner has done an act which, carried to its utmost possible limits without any interference from without, could cause death, and if his act could not have caused death then his belief that it could have caused death is outside the question. Suppose, for instance, that Cassidy had put his rifle all ready loaded and capped for the purpose of committing the murder, and that in the excitement of the moment he had snatched up a comrade's rifle which was unloaded, and the lock of which had been taken to pieces for repairs, that he had levelled it at his officer and pulled the trigger, it is plain that he had intended to do an act with such an intention that if by that act he had caused death he would have been guilty of murder; but that is not enough. The section requires, he should have done the act. He intended to discharge his own loaded rifle. He presented and tried to discharge a weapon which was harmless as a broomstick."

It may be considered at first sight remarkable that this question has never again come up for decision before any Court; but as a matter of fact the cases would be very rare in which Section 307 could not be applied, but Section 511 read with Section 300 could be applied. Even if the Bombay ruling be accepted in preference to the Allahabad ruling, such cases would only be those in which the accused intended to commit murder, but the circumstances were such that, for reasons unknown to himself, the act done could not possibly have caused death, e.g., if he pulled the trigger of a gun which he thought was loaded, but which was not loaded.

In re Mangavalli Ranaganaya Kamma, 1 Weir 328 (1889), it was held that to support a conviction under Section 307 it must be proved that the accused intended by his act to cause death, and also that the act was one capable of causing death in the natural and ordinary course of things although death did not eventually ensue. In *Jiwan Das v. King-Emperor*, 30 P. R. 1904, it was also pointed out that under Section 307 the act done must be one capable of causing death, and it must also be the last proximate act necessary to constitute the completed offence, whereas under Section 511 the act may be any act in the course of the attempt towards commission of the offence.

If, therefore, an intention to murder is proved, it would only be in cases in which the act was not capable of causing death that Section 307 would not apply and Section 511 would apply; and in most cases, if the act was not capable of causing death, it would be difficult to find that there was an intention to cause death. It is in fact not easy to think of any other case in which Section 511 and not Section 307 could apply than a case such as the Bombay case in which a man attempts to fire at another a gun which he believes to be loaded, but which is actually not loaded.

If the gun is loaded, but the cap does not explode, the Section 307 would apply (as in 14 A. 38), as the act of pulling the trigger of a loaded gun is one certainly capable of causing death. A similar case was the one in which a student pointed a five-chambered revolver at Sir Andrew Fraser and pulled the trigger twice, but owing to the damaged condition of the percussion cap the revolver did not go off. He was convicted under Section 307 (Unreported case 1908, Criminal Sessions, Calcutta, decided 9th November 1908).

It is also immaterial that the back of a chair on which the victim was seated intercepted a number of the shots, and thus prevented a fatal result; the offence is none the less an offence under Section 307, especially when the accused is a man accustomed to shooting and has fired at a person at a distance only of some six paces a cartridge containing shot of No. 6 size. If the accused has done all that he can do, and completed the only proximate act in his power, he cannot escape criminal responsibility because the consequences which he expected to ensue were prevented from ensuing.

(Emperor v. Abdul Rahman, 9 C. L. J. 432 = 2 Ind. Cas. 593 = 10 Cr. L. J. 57, 1909).

I will now cite other cases (a) in which there have been convictions under Section 307 or 308; (b) in which it has been held that Section 307 does not apply.

A Bombay.

(a) (i) Queen-Empress *v.* Khandu, 15 B. 194.—*vide* this case cited in Chapter II, page 20.

(ii) Emperor *v.* Bhagwan Giriappa, 19 Bom. L. R. 54 = 4 Bom. Cr. Case 1 :

Accused No. 1 administered to her husband a potion to save her from his quarrelsome tongue. The potion was supplied to her by her lover (accused No. 2 and his friend accused No. 3). It was held that No. 1 was guilty under Section 337; No. 2 under Sections 307 and 109; and No. 3 under Sections 328 and 109.

(b) (i) Queen-Empress *v.* Jiva, Rat. Un. Cr. C. 558 1891).

Where the accused threw his wife out of a window six feet high, but the fall was broken by a weather board fixed just below the window, and the act resulted in a fracture of the kneepan and several wounds, it was held by Jardine and Birdwood, JJ., that the offence was one under Section 325 and not under Section 307, since an intention to kill could not be inferred from the act. Parsons, J., thought the offence was one under the latter part of Section 308.

(ii) Reg. *v.* Chima, 8 B. H. C. Cr. 164 1871 :

The fact that the illegitimate child of a Brahman widow was found wrapped up in a cloth and with a pot turned over its head when the Police rushed into the room just opened and the suggestion that the mother was interested in killing the child, are not sufficient evidence to support a conviction for an attempt to murder.

(iii) Emperor *v.* Martu Vithoba Prabhu, 15 Bom. L. R. 991 = 2 Bom. Cr. C. 159 = 14 Cr. L. J. 641 = 21 Ind. Cas. 881 1913:

A person striking his wife on her neck with an axe and causing an incised wound is guilty under Section 324 and not under Section 307. The only act which can fall within the purview of Section 307 is an act which by itself must be ordinarily capable of causing death in the natural and ordinary course of events.

B. Allahabad.

(a) (i) Queen-Empress *v.* Middha, 14 A. 38. (See above.)

(ii) Queen-Empress *v.* Tulsha, 20 A. 143 (1898) :

Where a woman of 23 was found to have administered datura to three members of her family, it was held that she must be presumed to have known that the administration of datura was likely to cause death, although she might not have administered it with that intention. The conviction under Section 307 was upheld. (See page 89.)

(iii) Emperor *v.* Mt. Nannhi Bahu, 5 Ind. Cas. 138 = 11 Cr. L. J. 48 (1910) :

The accused in the course of a quarrel with her sister-in-law, and in a fit of anger, flung her child, three years old, into a pond four feet deep, on the edge of which her house was situated, and at the same time gave expression to a wish that the death of the child should rest as a curse on the woman with whom she was quarrelling. It was held that the circumstances gave rise to a presumption that the intention of the accused was to cause the death of the child, and that she was therefore guilty under Section 307 although the child was picked up by a bystander without loss of time.

(b) (i) Emperor *v.* Kundan, 43 A. W. N. 1903

Where a woman abandoned her newly born child, but left it in a place which was quite close to the village and also near a public road, where in fact the child was shortly after discovered, it was held that she could not rightly be convicted of an attempt to murder, but should rather be convicted under Section 317.

(ii) Emperor *v.* Husain Bakhsh, 172 A. W. N. 1881 :

The accused threw two large bricks at a jailor, one of which struck him on the shoulder. This was done immediately after the jailor had lodged a complaint against the accused and there was no premeditation. The accused said at the time to the jailor that he meant to kill him. It was held that the facts did not justify a conviction for attempt to murder. The offence was only an attempt to cause grievous hurt. Had murder been intended, it is reasonable to suppose that the prisoner would have watched for a better opportunity and used a more deadly weapon.

C. Calcutta.

(a) (i) J. Roy Chowdhury, unreported case 1908. (See above.)

D. Madras.

(a) (i) *In re Mangavalli Ranganaya Kamma*, 1 Weir 328, (See above) :

The accused, a Brahmin widow, enticed into her house a boy aged nine years, used violence to him, and stripped him of several jewels. Being unable to remove his anklets and earrings, she lifted him up, and tying his wrist together with a rope, having a hook at each end, tied the rope round his neck and put a cloth in his mouth. She then took him into a room, and placed him sitting in a jar and put a mill stone on the mouth of the jar, leaving him in this position all night. She did not give him food all night, and before dawn she lifted the stone, and seeing that the boy was there replaced the stone over the jar. Whilst in the jar the boy untied the rope from his wrists with his teeth, and then cut the rope off his neck. In the morning he lifted off the stone, and the jar sloping a little, he got out and ran home. It was held that the accused was rightly convicted under Sections 307, 392 and 394.

(ii). The Public Prosecutor v. Kolangaret Imbichikuttam 16 Cr. L. J. 542 = 29 Ind. Cas. 670 (1915) :

A person intentionally discharging a loaded gun at another from a short distance, inflicting injuries which might have proved fatal, is guilty of an offence under Section 307 and not merely of causing grievous hurt.

E. Punjab.

(a) (i) Malik Ahmad Yar Khan v. Crown, 11 P. W. R. 1910 = 5 Ind. Cas. 602 = 11 Cr. L. J. 171.

A person firing two shots successively at another person clearly shows murderous intent.

(ii) Gayan Singh v. Crown, 13 P. W. R. 1915 = 132 P. L. R. 1915.

A man who inflicts 20 incised wounds on the body of person, most of which were aimed at his head, must be credited with murderous intent and a sentence of transportation for life is not excessive.

(iii) Alexandra Ruffe v. Emperor, 6 P. R. 1912.

The wounding of a person with a knife in the neck only $\frac{1}{4}$ th of an inch from the carotid artery is an act so imminently dangerous that it must in all probability cause death. In awarding punishment under Section 307 the fact that the accused had contracted the morphia habit and was a very fickle-minded person may be taken into consideration, although there is no indication of a plainly marked mental aberration.

(iv) Ladha Singh v. Emperor, 60 Ind. Cas. 50.

Accused sent some sweetmeats containing arsenic to A with the intention of causing her death. B and C also shared the sweets with A. Held (1) that the accused was guilty of an attempt to murder not only A but also B and C; (2) that the accused cannot escape conviction merely because it is not proved that the amount of arsenic which he had caused to be taken was sufficient in the ordinary course of nature to cause death.

(b) (i) Data Ram v. Empress, 45 P. R. 1882.

The mere act of bringing a sword is not an act of such an approximate nature as would amount to an attempt to commit murder or grievous hurt, although it may be a preparation towards the commission of some such offence.

(ii) Gholam Russool v. Crown, 32 P. R. 1866.

Conviction under Section 307 altered to one under Section 326 as no intention to murder was proved.

(iii) Empress v. Mt. Bakhtawar, 24 P. R. 1882.

A request to a native doctor by the accused for medicine for the purpose of poisoning her son-in-law was not an attempt to commit murder but was merely a preparation. But the act could be held to be an instigation of the doctor to abet the accused in the commission of murder punishable under Section 302 read with Section 116.

(iv) *Jiwan Das v. Emperor*, 30 P. R. 1904 see above.

The accused ran after the complainant with an axe in his hand and raised it to the shoulder when about four *kadams* from the complainant, but before there was time to do anything further in pursuance of his purpose, the axe was snatched out of his hand.

It was held that the accused was not guilty of an attempt to murder as neither of his acts could *per se* have caused death, but that he was guilty of an attempt to cause grievous hurt punishable under Section 511 read with Section 326.

F. Burma.

(a) (i) *Kyaw We v. King-Emperor*, 4 L. B. R. 311, F. B = 9
Cr. L. J. 11.

Per Irvine, offg. C. J. "The offence which is called shortly in the marginal index to Section 307 "attempt to murder" does not depend at all on the nature of the hurt actually inflicted ; it is an offence which may be committed without inflicting any hurt at all, as will be clear from the first illustration to the section. Though, in most cases, the nature of the injuries inflicted is of considerable assistance in coming to a finding as to the intention with which the accused acted, yet such intention must also be deduced from a consideration of the whole facts of the case and may even be ascertained in some cases without reference to the wounds at all."

Per Hartnoll, J. "The acts of M. K. W. were to aim at and cut M. M. P. with the deadly weapon described and in the manner described. From these acts must be deduced his intention. If his intention was to cause death or bodily injury, the bodily injury intended to be inflicted being sufficient in the ordinary course of nature to cause death, then in my opinion he has been rightly convicted. Every man must be assumed to intend the natural or necessary consequences of his own act. What is there in this case to deduce M. K. W.'s intention from ? There is the size of the weapon he wielded and its nature. There is the approaching from behind. There is the cutting on the neck, a very vital part of the body, and on the vicinity of the neck. There is also the nature of the injuries inflicted." Conviction under Section 307 upheld.

(b) (i) *Nga Shew Nwe v. Queen-Empress*, L. B. R. 1872 — 1892, 466.

In the absence of any evidence to show that the wounds inflicted by the accused are dangerous or likely to cause death the accused cannot be convicted of an attempt to murder (Section 307) or attempt to commit culpable homicide (Section 308) but only of voluntarily causing grievous hurt.

(ii) *Crown v. Tha Do Hla*, 1 L. B. R. 264.

The act of raising a knife in a threatening manner, manifesting an intention to stab, but without actually trying to stab, falls short of an attempt to stab.

The following extract from the Notes appended to the draft Penal Code of 1837 will disclose the intention of the authors of the Code :—

"These clauses appear to us absolutely necessary to the completeness of the Code. We have provided under the head of bodily hurt for cases in which hurt is inflicted in an attempt to murder; under the head of assault, for assaults committed in attempting to murder; under the head of criminal trespass, for criminal trespass committed in order to murder. But there will still remain many atrocious and deliberate attempts to murder which are not trespasses, which are not assaults, and which cause no hurt. A, for example, digs a pit in his garden intending that Z may fall in and perish there. Here A has committed no trespass, for the ground is his own, and no assault for he has applied no force to Z. He may not have caused, bodily hurt, for Z may have received a timely caution or may not have gone near the pit; but A's crime is evidently one which ought to be punished as if he had laid hands on Z with the intention of cutting his throat.

Again A sets poisoned food before Z. Here A may have committed no trespass, for the food may be his own; and, if so, he violates no right of property by mixing arsenic with it. He commits no assault, for he means the taking of food to be Z's voluntary act. If Z does not swallow enough of the poisoned food to disorder him, A causes no bodily hurt; yet it is plain that A has been guilty of a crime of a most atrocious description.

Similar attempts may be made to commit voluntary culpable homicide in any of the three mitigated forms. A, for example, is excited to violent passion by Z, and fires a pistol intending to kill Z. If the shot proves fatal, A will be guilty of manslaughter; and he surely ought not to be exempted from all punishment if the ball only grazes the intended victim.

It is to meet cases of this description that these clauses are intended.

CHAPTER X.

GENERAL EXCEPTIONS, SECTIONS 76—95.

(So far as they concern the question of homicide and hurt).

Sections 76—79.

Section 76.—Nothing is an offence which is done by a person who is, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be, bound by law to do it.

ILLUSTRATION.

(a) A, a soldier, fires on a mob by the order of his superior officer in conformity with the commands of the law. A has committed no offence.

Section 77.—Nothing is an offence which is done by a Judge when acting judicially in the exercise of any power which is, or which in good faith he believes to be, given to him by law.

Section 78.—Nothing which is done in pursuance of, or which is warranted by the judgment or order of a Court of Justice if done whilst such judgment or order remains in force, is an offence notwithstanding the Court may have had no jurisdiction to pass such judgment or order, provided the person doing the act in good faith believed that the Court had such jurisdiction.

Section 79. - Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be justified by law, in doing it.

ILLUSTRATION.

A sees Z commit what appears to A to be murder. A in the exercise, to the best of his judgment exerted in good faith, of the power which the law gives to all persons of apprehending murderers in the act seizes Z in order to bring Z before the proper authorities. A has committed no offence though it may turn out that Z was acting in self-defence.

In the case of a soldier the Penal Code does not recognise the mere duty of blind obedience to the commands of a superior as sufficient to protect him from the penal consequences of his act where that act affects the person and property of another subject. The law requires that the soldier should exercise his own judgment, and unless the actual circumstances are of such a character that he may reasonably have entertained the belief that the order was one which he was bound to obey, he will be responsible like any other sane person for his act although he may have committed it under the erroneous supposition that his superior was by law authorised to issue the order.

So where three sepoys, acting under the orders of their Naik, fired upon a mob which was threatening them under circumstances which did not render the act excusable under Section 96 with the result that two men were shot dead, it was held that the sepoys were not protected by Section 76, as they were cognizant of all the circumstances of the quarrel, and as there being no room for a mistake of fact, they should have known that the Naik was acting wrongly in ordering them to fire upon the mob.

(Niamat Khan v. Empress, 17 P. R. 1883).

Similarly when a Station House Officer, accompanied by some constables, went to disperse some reapers, and when they did not disperse, one of the constables, in accordance with the orders of the Station House Officer, first fired into the air and then fired at the reapers, mortally wounding one of them, it was held that neither the Station House Officer nor the constable believed that it was necessary for the public security to disperse the reapers by firing on them, and therefore they were not acting in good faith and the order to shoot was illegal and did not justify the constable, and both he and the Station House Officer were guilty of murder.

(Queen-Empress v. Subba Naik, 21 M. 249).

Nothing but fear of instant death is a defence for a policeman who tortures a man or woman by superior order. The maxim *respondeat superior* has no application in such a case (Queen-Empress v. Latif Khan, 20 B. 394).

Section 80.

Section 80. Nothing is an offence which is done by accident or misfortune, and without any criminal intention or knowledge, in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution.

ILLUSTRATION.

A is at work with a hatchet; the head flies off and kills a man who is standing by. Here, if there is no want of proper caution on the part of A, the act is excusable and not an offence.

Two men, the accused and the deceased, went into a jungle shikaring porcupines. They agreed to take up certain positions in the jungle and lie in wait for game. This was done. After a while the accused heard a rustle, and believing it was a porcupine fired in that direction. The shot, however, reached his companion and caused his death. It was held that the accused was protected by Section 80, the affair being a pure accident; and that the fact that he was shooting with an unlicensed gun would not affect his immunity under the section.

(King-Emperor Timmappa, 3 Bom. L. R. 678).

Similarly in a case when the accused went out shooting at a time when people were likely to be about in the fields, and a single pellet from his gun struck a man who was sitting in a field, it was held that the accused should be acquitted (Emperor v. Abdus Sattar, 28 A. 464). And when accused placed a loaded gun with the hammer down on the cap on the cot outside his house and went to a neighbouring house and a child was killed by the gun exploding, it was held that the accused could not be convicted under Section 286 (Queen-Empress v. Chanchugadu, 8 M. 421).

When a person has sexual intercourse with a girl of a little over 12 years of age, and thereby causes grievous hurt to her, he commits an offence under Section 325, and is not protected by Section 80 or Section 88.

(Emperor v. Mohammad Miyan, 12 C. P. L. R. 11).

The law sets bounds to the extent to which human life might be endangered but for some restriction by mistakes arising from timidity so excessive as to be inexcusable when a little ordinary precaution would prevent such mistakes arising. This restriction is enforced by enjoining proper care and caution as a duty of citizenship when there is time for the exercise of caution to verify the grounds of fear. It is the absence of

such proper care and caution as is referred to in Section 80 which is the essence of criminality in those rash and negligent acts which are made punishable under the Code.

(*Naga Shwe v. Queen-Empress*, L. B. R, 1893—1900, 221.)

Although it is true that it is for the person who has taken the life of another to show that the homicide was accidental, or that it did not amount to murder, yet it is necessary in order to throw the burden of exculpating himself on the accused in a case of murder that the witnesses for the prosecution should have told a story which can be believed in itself, and that the Judge is satisfied that they are not concealing circumstances which would go to reduce the offence if disclosed.

(*Queen-Empress v. Ram Gopal*, 121 A. W. N. 1897.)

Section 81.

Section 81. Nothing is an offence merely by reason of its being done with the knowledge that it is likely to cause harm if it be done without any criminal intention to cause harm and in good faith for the purpose of preventing or avoiding harm to person or property.

Explanation.—It is a question of fact in such a case whether the harm to be prevented or avoided was of such a nature and so imminent as to justify or excuse the risk of doing the act with the knowledge that it was likely to cause harm.

At a fire some sepoys of a native regiment were ordered by their officer to keep clear a space in front of the burning house and not to allow any one not in uniform to approach.

The Chief Constable came up with some police, and on their coming round to the front of the house were warned off by the sentries. A fracas ensued, during which the Chief Constable was kicked by one of the sepoys, the accused. He was convicted under Section 323. The conviction was set aside on appeal. It was found that the Chief Constable was not in uniform and the accused did not know who he was, and it was held, that the kick was justified under Section 81 as given in good faith for the purpose of preventing much greater harm, *viz.*, the looting of the house on the spreading of the fire, and as a means of acting up to the military order.

(*Queen-Empress Bostan*, 17 B. 626, 1893.)

Section 81 would apply only to acts done without any criminal intention to cause harm, and it would not therefore

apply to a case in which the accused with the object of punishing or detecting the stealers of his toddy mixed a poisonous drug with it supposing that they might drink it, and thereby caused injury to certain persons who purchased it from an unknown vendor.

(Reg v. Dhania Daji, 5 B. H. C. Cr. 59, 1868).

Sections 82 and 83.

Section 82. Nothing is an offence which is done by a child under seven years of age.

83. Nothing is an offence which is done by a child above 7 years of age and under 12 who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion.

As nothing can be an offence which is done by a child under 7 years of age, it is not an offence to obstruct the arrest of such a boy.

(Santa Gruz Moraiz v. Emperor, 543 M. W. N. 1915 = 30 Ind. Cas. 154 = 16 Cr. L. J. 602.)

In construing Section 83 the capacity of doing what is wrong is not so much to be measured by years as by the strength of the offender's understanding and judgment. Such a degree of malice may be disclosed by the circumstances of a case as to justify the application of the maxim *malitia supplet cætatem*.

(Queen v. Aimona, 1 W. R. Cr. 43)

The "consequences of his conduct" referred to in this Section are not the penal consequences to the offender, but the natural consequences which flow from a voluntary act.

(Queen v. Lukhini Agradanini, 22 W. R. Cr. 27.)

Before convicting a child under 12 years of age the Magistrate must find that he has attained sufficient maturity of understanding to judge of the nature and consequences of his act.

(Queen Empress v. Makimuddin, 27 C. 133.)

Sections 84, 85 and 86.

Sections 84. Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

Section 85. Nothing is an offence which is done by a person who, at the time of doing it, is by reason of intoxications incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law, provided that the thing which intoxicated him was administered to him without his knowledge or against his will.

Section 86. In cases where an act done is not an offence unless done with a particular knowledge or intent, a person who does the act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated, unless the thing which intoxicated him was administered to him without his knowledge or against his will.

A person subject to insane impulses, but whose cognitive faculties appear to be unimpaired, is not by virtue of Section 84 exempt from criminal liability. In extreme cases it is difficult to say that the cognitive faculties are not affected when the will and the emotions are affected. It may therefore be said that under the provisions of Section 84 exemption from criminal liability, by reason of unsoundness of mind, extends as well to cases where insanity affects the offender's will and emotions as to those where it affects his cognitive faculties. "In extreme cases this may be true, but we are not prepared to accept the view as generally correct that a person is entitled to exemption from criminal liability under our law in cases in which it is only shown that he is subject to insane impulses notwithstanding that it may be clear that his cognitive faculties, so far as we can judge from his acts and words, are left unimpaired. To take such a view as this would be to go against the plain language of Section 84 and the received interpretation of that section; see Queen Empress *v.* Lakshman Dagdu, 10 B. 512; Queen Empress *v.* Venkatasami 12 M. 459; Queen Empress *v.* Razai Mia, 22 C. 817."

(Queen Empress *v.* Kader Nasyer Shah, 23 C. 604)

The accused in this case had killed a child, and it was found that the circumstances attending the murder went to show that he could not have been devoid of knowledge of the nature of his act, though they showed that at the time he must have been suffering from mental derangement of some sort. Therefore, though it was held that the accused was not entitled to an acquittal, action was taken under Section 401, C. P. C.

In the Bombay case cited (10 B. 512) the accused killed his two children with a hatchet, the reason given being that, while he was laid up with fever, the crying of the children annoyed him. There was no concealment, and he confessed the crime. It was alleged that the fever had made him irritable and sensitive to sound, but as he was not delirious at the time of committing the crime, he was held guilty of murder.

In the Madras case (12 M. 459) the accused stabbed his brother's wife, a child, and killed her. No motive was suggested for his killing the child, and he was living with the child affectionately. He had been sick of fever for six days previous to the occurrence and had taken little food during that period, and had acted strangely and abused his father and brother. The medical evidence proved merely the possibility of a sudden attack of homicidal mania. Before the village Magistrate the accused confessed that he had killed the child and had answered the questions put to him rationally. It was held that there was no positive evidence that the accused was suffering from delirium at the time he committed the murder or that he was unconscious of the nature of the act he committed.

In the Calcutta case (22 C. 817) it was held that Section 84 requires that the unsoundness of mind in order to be a valid ground of non-liability must be such as would make the accused incapable of knowing the nature of the act or that he is doing what is contrary to law; and it is for the defence to make out this ground of non-liability. The mere fact that a person accused of murder had been of unsound mind for some time before the murder and was *not quite of sound mind* after the murder would not be sufficient to exonerate the accused from responsibility from the crime.

Queen Empress *v.* Kader Nasyer Shah 23 C. 604 was followed *in extenso* in Chaju Mal *v.* King Emperor, 94 P. L. R. 1909 = 16 P. W. R. 1909 = 4 Ind Cas. 985 = 11 Cr. L. J. 105; and in Ramzan *v.* Crown 30 P. R. 1918, it was again held that Section 84 will not apply unless it is shown that the accused's cognitive faculties have been impaired by the unsoundness of his mind. 23 C. 504 was also followed in Dhani-bux *v.* Crown, 9 S. L. R. 171 = 32 Ind. Cas. 671 = 17 Cr. L. J. 79; and in Ram Sundar Das *v.* Emperor, 23 C. W. N. 621 = 29 C. L. J. 309 = 20 Ind. Cas. 991, and in Mantajali *v.* Emperor, 55 Ind. Cas. 477 Cal. Similarly the Patna High

Court in Ghinua Uraon *v.* Emperor, 4. P. L. W. 14 = 1918 Pat. 57 = 19 Cr. L. J. 135 = 43 Ind. Cas. 423 has held that when a person otherwise sane, but labouring under the influence of an insane delusion, commits an act of revenge for some supposed grievance or injury, he is nevertheless punishable according to the nature of the crime committed if at the time he understood that he was committing a wrong and unlawful act. In other words he must be considered in the same situation as to responsibility as a sane person would be if the facts with regard to which the delusion exists were true. See also Seat Ali *v.* Emperor, 18 Cr. L. J. 766 = 41 Ind. Cas. 142 (Patna).

The Madras High Court followed 12 M. 459 and 23 C. 604 in *in re Muthasawami Asari* (1919 M. W. N. 776 = 26 M. L. T. 361 = 53 Ind. Cas. 828). The accused was charged with having killed his wife, and it was proved that sometime before the occurrence he was subject to insane fits, but there was no proof that when he committed the murder he did not know the nature and consequences of his act. It was held that though the accused seemed to have stabbed his wife in a fit of homicidal mania, it could not be said that he was free from criminal responsibility; but the papers were submitted to Government under Section 401, C. P. C.

But when it is found that the accused was not only under an insane delusion at the time of committing a murder, but was also not aware at the time that he was doing an act which was morally wrong, this section will apply. (*Alam Sher v. Emperor*, 8 P. R. 1889).

So when the accused cut his wife's throat without any rational motive, and was captured at once without any attempt on his part to escape or offer resistance, and the evidence showed that before the commission of the offence he suffered from a failure of reasoning powers and also that he entertained delusions as to dangers which threatened his wife, it was held that the facts proved unsoundness of mind which prevented the accused from knowing the nature of his act, and that Section 84 applied.

(*Dil Gazi v. Emperor*, 34 C. 686).

The section was also applied (1) in a case in which the prisoner was a man of weak intellect, and killed his uncle without a motive by beating him on the head and neck with a sword, and then rushed out brandishing his sword and calling out "Victory to Kali," and attempted to kill other persons,

including his own father (*Shibo Koeri v. Emperor*, 10 C. W. N. 725 = 3 Cr. L. J. 469).

(2) In a case in which the accused was known as "Mad Nga Pyan," and immediately before he committed the offence he was noticed by persons to be in one of his mad fits, and he was under a delusion that the Phongyi whom he attacked was keeping his sisters and daughters in the monastery.

(*Nga Pyan v. Emperor*, 4 Bur. L. J. 267 = 13 Cr. L. J. 49 = 13 Ind. Cas. 385, 1912).

It was held not to apply—

(1) to a case where the accused severely beat a woman of 18 years of age with sticks for exercising a spirit out of her (*Queen Empress v. Jamaluddin, Rat. Un. Cr. C. 603*):

(2) to a case where the accused had drunk liquor, walked two miles in the sun, and then received a blow on the head. The term "unsoundness of mind," it was held, cannot be construed so widely as to cover the loss of self-control following a hostile blow on the head even though the loss of self-control may be all the more complete on account of the head being inflamed with alcohol and the exposure to the sun. (*Maung Gyi v. King-Emperor*, 7 L. B. R. 13 = 20 Ind. Cas. 411 = 14 Cr. L. J. 42, 1913).

When a quiet peaceable man suddenly and without the least motive or provocation runs amuck against all around him, his case is different from an ordinary case of deliberate murder deserving of the extreme penalty. (*Queen v. Bishonath Bunnia*, 8 W. R. Cr. 53).

Under Section 84 unsoundness of mind producing incapacity to know the nature of the act committed, or that it is wrong or contrary to law, is a defence to a criminal charge; but under Section 85 such incapacity is no defence if produced by voluntary drunkenness. If, however, voluntary drunkenness causes a disease which produces such incapacity, then Section 84 applies though the disease may be only of a temporary nature.

Thus when the evidence shows that the accused was addicted to intemperate habits of excessive use of opium, and that for some days before and after committing a murder he was irresponsible for his actions Section 84 may be applied.

(Emperor *v.* Bheleka Aham, 29 C. 493).

If a person is of unsound mind, he is to be judged by the ordinary rules in regard to insanity, no matter whether the insanity arose from disease of the brain or from persistent indulgence in intoxicating drugs or liquor.

(Emperor *v.* Harka, 193 A. W. N. 1906 = 3 A. L. J. 463 = 4 Cr. L. J. 88).

So when a person commits a crime under the influence of *ganja*, the Court in estimating his criminal responsibility must distinguish between intoxication simulating insanity caused by a bout or repeated bouts of *ganja* smoking and unsoundness of mind within the meaning of Section 84 induced by excessive use of the drug.

(Vithoo *v.* Emperor, 7 N. L. R. 185 = 13 Ind. Cas. 916 = 13 Cr. L. J. 164, 1912).

Voluntary drunkenness is not an excuse for committing a crime (Karim Khan *v.* Crown, 4 P. W. R. 1909 = 1 Ind. Cas. 100 = 9 Cr. L. J. 156), nor should it be treated as an aggravation of the offence (Queen *v.* Zulfukar Khan, 8 B. L. R. 21 = 16 W. R. Cr. 36).

The omission of the word "intention" from the latter half of Section 86 has led to some conflict of opinion as to the scope of this section.

A Full Bench of the Court of Lower Burma discussed the question in Tun Baw *v.* Emperor, 6 L. B. R. 100 = 5 Bur. L. J. 193 = 17 Ind. Cas. 800 = 13 Cr. L. J. 864 (1912):—

"The general presumption of law is that a man is taken to intend the ordinary and natural consequences of his acts; if a drunken man relies on his drunkenness as absolving him from crime, he must show that his mind was so affected by the drink he had taken that he was incapable of forming the intention necessary to constitute the offence charged against him. The effect of the omission to make any express provision in Section 86 regarding the intention which is to be attributed to a voluntary drunkard committing an act which is an offence when done with a particular or *specified* intent is that the question of intention is left to be dealt with on the general principles of law, which are the same both in India and England. Drunkenness of an accused person at the time he

committed the act charged as an offence may be and should be taken into consideration on the question whether he did the act with the intention necessary to constitute the offence charged. The law does not require that the intention, which would be ascribed to a sober man in connection with an act, must necessarily be ascribed to a drunken man who does the same act. Section 86 gives the drunken man the knowledge of the sober man when judging of his action, but does not give the same intention; it does not render him liable to be dealt with as if he had the same intent."

Per Hartnoll, J. To form an intention a man must necessarily have the requisite knowledge to do so; but if he has a certain knowledge, he must, to form an intention, go a step further than having such knowledge.

Per Young J. In most cases intention has to be inferred from the nature of the acts done and from all the circumstances of the case. If a drunkard, by reason of his drunkenness, does not know the nature of his act, he cannot be presumed to have intended the consequences of his act. Therefore in cases when an act is not an offence at all unless it is done intentionally, drunkenness is an excuse. A drunkard is often fully conscious of what he is doing and what are the natural consequences of his acts. If he fails to prove that owing to intoxication he had not the same knowledge in relation to the offence as he would have had if sober, the Section 86 will not apply at all, and an intention will be presumed or not just as it would be in the case of a sober man.

This case was referred to by the Punjab Chief Court in *Pal Singh and Surain Singh v. Crown*, 28 P. R. 1917. The conviction was under the fourth clause of Section 300, under which knowledge only is an essential and intention need not be proved or inferred. Therefore, as far as the question of conviction was concerned, Section 86 was applied without difficulty; but it was also used in considering the question of sentence:—"Under Section 86 a person who does an act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated; and therefore in a case such as the present it is clear that the fact that the appellants were intoxicated at the time they assaulted is no excuse, and they must have had the knowledge referred to in Section 300." The question remains whether the capital sentence should be imposed. The general principle of law is that a man

to intend the ordinary and natural consequences of his act. Section 86 attributes to a drunken man the knowledge of a sober man, but does not give him the same intention (*Nga Tun Baw v. Emperor*). This knowledge is the result of a legal fiction, and constructive intention cannot invariably be raised. In the absence of an intention to cause death, or such bodily injury as is likely to cause death, it may reasonably be urged that drunkenness or a state of intoxication is a ground for not executing the extreme penalty of the law".

The High Court of Madras discussed the question in "*in re Mandru Gadaba*, 38 M. 479 (1915)."

Ayling, J., held:—"Ordinary drunkenness makes no difference to the knowledge with which a man is credited. If the accused knew what the natural consequences of his act were, he must be presumed to have intended them. The offence therefore (hacking deceased to death with a *tangi*) comes within the substantive portion of Section 300."

Tayabji, J., held:—"It is true that Section 86 lays down that in certain cases an intoxicated person shall be liable to be dealt with as if he had the same knowledge as he would have had if he had been sober. But it does not provide that the intoxicated person shall be dealt with as if he had the same intent. It seems to me that the word 'intent' was advisedly omitted, as knowledge and intent are both referred to in the earlier portion of the section. On the other hand it must be noted that Section 86 expressly deals with 'cases when an act is done with a particular knowledge or intent.' It may therefore be that Section 86 implies that intent should be inferred from knowledge, though knowledge alone is expressly imputed to the intoxicated person.

"The section should in my opinion be construed strictly. But it is unnecessary to express any final opinion on this aspect of the case and on the effect of the necessary inferences to be drawn from the knowledge which Section 86 imputes to an intoxicated person. For even taking the restricted interpretation of Section 86 that is contended for as being the correct one on behalf of the accused, he comes within the fourthly mentioned clause in Section 300."

If it is accepted as a correct theory that a direct assault on a particular person resulting in his death can fall under the fourth clause of Section 300, then the omission of the

word "intent" in the second portion of Section 86 is immaterial in a case of a murder by a drunken man. His case can always be brought under the fourth clause of Section 300, as under that clause it is only necessary to prove "knowledge."

It might even possibly be argued that even though a direct assault by a sober man on a particular individual resulting in that person's death could not be brought within the fourth clause of Section 300, yet a similar assault by a drunken man might fall within that clause on the ground that, although he could not be presumed to have had any special intention, yet he must be presumed to have had "knowledge of the imminently dangerous nature of his act."

In such cases, if there is held to be an absence of intention, though there can be a conviction for murder, such absence of intention might be held to be a ground for not inflicting the extreme penalty of the law.

If, however, neither of these theories are accepted, then in each case it will have to be considered whether an intention can be inferred from the knowledge which is imputed to the drunken man.

As is pointed out in *Waris Ali v. Emperor*, 7 N. L. R. 180=13 Cr. L. J. 167=13 Ind. Cas. 919 (1912), the fact of drunkenness may alter the nature of the *legal offence* committed, though it is no excuse for the act; this occurs when an essential of the crime is the presence of some particular knowledge or intention; and intention is sometimes a presumption of law; sometimes it is a mere fact to be presumed like any other fact.

Under ordinary circumstances intention may be inferred from knowledge, but it cannot always be inferred when knowledge is merely a legal fiction. (*Abdul Karim v. Queen Empress*, L. B. R. 1872—1892, 650).

No hard and fast rule can be laid down as to how far intention can be inferred from knowledge in the case of a drunken man, but it may be generally stated that when a man is so drunk (provided that the thing which intoxicated him was not administered to him without his knowledge or against his will) that he actually has no knowledge of the nature of his act, or that he is doing what is either wrong or contrary to law, then intention cannot be inferred from the legal know-

ledge imputable to him under Section 86; and such intention would have to be proved as a fact. But if he does not prove that his intoxication was so extreme that he had no knowledge at all of the nature of the act, then in proportion as his knowledge becomes less a legal fiction and more an actual fact, so much the more can an inference of intention be drawn. If, in spite of his intoxication, he had practically complete knowledge of what he was doing, then (as is pointed out by Young, J., in *Nga Tun Baw v. Emperor*), Section 86 need not be applied at all, and an intention will be presumed or not just as it would be in the case of a sober man.

An inference of intention was drawn in *Po Tu v. King-Emperor*, 4 L. B. R. 306=9 Cr. L. J. 5 (1908). In this case the accused had cut his grandfather on the head with a heavy chopper, slicing off a bit of the frontal bone and cutting the brain. The wounded man subsequently died. It was held by two Judges (the third dissenting) that the accused's intention should be inferred from his act, but not solely from the consequences of that act; that the result of cutting a man on the head with a heavy chopper being generally death, the accused must be taken to have known that this is the natural consequence of such an act; and that he must therefore be presumed to have intended to cause death. Section 86 does not establish any presumption of law relating directly to intention, but it binds the Court to treat the accused as having the same knowledge as he would have had if he had been sober, and intention in this case is an inference from knowledge.

Sections 87—93.

Section 87. Nothing which is not intended to cause death or grievous hurt, and which is not known by the doer to be likely to cause death or grievous hurt, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, to any person above 18 years of age who has given consent, whether express or implied, to suffer that harm; or by reason of any harm which it may be known by the doer to be likely to cause to any such person who has consented to take the risk of that harm.

ILLUSTRATION.

A and Z agree to fence with each other for amusement. This agreement implies the consent of each to suffer any harm

which in the course of such fencing may be caused without foul play ; and if A, while playing fairly, hurts Z, A commits no offence.

Section 88. Nothing which is not intended to cause death is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to any person for whose benefit it is done in good faith, and who has given a consent, whether express or implied, to suffer that harm or take the risk of that harm.

ILLUSTRATION.

A, Surgeon, knowing that a particular operation is likely to cause the death of Z, who suffers under a painful complaint, but not intending to cause Z's death, and intending in good faith Z's benefit, performs that operation on Z with Z's consent, A has committed no offence.

Section 89. Nothing which is done in good faith for the benefit of a person under 12 years of age, or of unsound mind, by or by consent, either express or implied, of the guardian or other person having lawful charge of that person, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to that person ; provided—

Firstly, that this exception shall not extend to the intentional causing of death or to the attempting to cause death :

Secondly, that this exception shall not extend to the doing of anything which the person doing it knows to be likely to cause death for any purpose other than the preventing of death or grievous hurt or the curing of any grievous disease or infirmity :

Thirdly, that this exception shall not extend to the voluntary causing of grievous hurt, or to the attempting to cause grievous hurt, unless it be for the purpose of preventing death or grievous hurt or the curing of any grievous disease or infirmity :

Fourthly, that this exception shall not extend to the abetment of any offence to the committing of which offence it would not extend.

ILLUSTRATION.

A in good faith, for his child's benefit, without his child's consent, has his child cut for the stone by a surgeon knowing

it to be likely that the operation will cause the child's death but not intending to cause the child's death. A is within exception inasmuch as his object was the cure of the childⁿ.

Section 90. A consent is not such a consent as is intended by any section of this Code if the consent is given by a person under fear of injury or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or, if the consent is given by a person who from unsoundness of mind or intoxication is unable to understand the nature and consequence of that to which he gives his consent; or, unless the contrary appears from the context, if the consent is given by a person who is under 12 years of age.

Section 91. The exceptions in Sections 87, 88 and 89 do not extend to acts which are offences independently of any harm which they may cause, or be intended to cause or be known to be likely to cause, to the person giving the consent, or on whose behalf the consent is given.

Section 92. Nothing is an offence by reason of any harm which it may cause to a person for whose benefit it is done in good faith, even without that person's consent, if the circumstances are such that it is impossible for that person to signify consent, or if that person is incapable of giving consent and has no guardian or other person in lawful charge of him from whom it is possible to obtain consent in time for the thing to be done with benefit: provided—

Firstly, that this exception shall not extend to the intentional causing of death or the attempting to cause death:

Secondly, that this exception shall not extend to the doing of anything which the person doing it knows to be likely to cause death for any purpose other than the preventing of death or grievous hurt, or the curing of any grievous disease or infirmity:

Thirdly, that this exception shall not extend to the voluntary causing of hurt, or to the attempting to cause hurt, for any purpose other than the preventing of death or hurt:

Fourthly, that this exception shall not extend to the abetment of any offence to the committing of which offence it would not extend.

ILLUSTRATIONS.

- (a) Z is thrown from his house and is insensible. A, a Surgeon, finds that Z requires to be trepanned. A, not intending

Z's death, but in good faith for Z's benefit performs the trepan before Z recovers his power of judging for himself. A has committed no offence.

(b) Z is carried off by a tiger. A fires at the tiger knowing it to be likely that the shot may kill Z, but not intending to kill Z, and in good faith intending Z's benefit. A's ball gives Z a mortal wound. A has committed no offence.

(c) A, a Surgeon, sees a child suffer an accident which is likely to prove fatal unless an operation be immediately performed. There is no time to apply to the child's guardian. A performs the operation in spite of the entreaties of the child, intending in good faith the child's benefit, A has committed no offence.

(d) A is in a house which is on fire with Z, a child.

People below hold out a blanket. A drops the child from the house top knowing it to be likely that the fall may kill the child, but not intending to kill the child, and intending in good faith the child's benefit. Here even if the child is killed by the fall, A has committed no offence.

Explanation.—Mere pecuniary benefit is not benefit within the meaning of Sections 88, 89 and 92.

Section 93. No communication made in good faith is an offence by reason of any harm to the person to whom it is made if it is made for the benefit of that person.

ILLUSTRATION.

A, a Surgeon, in good faith communicates to a patient his opinion that he cannot live. The patient dies in consequence of the shock. A has committed no offence though he knew it to be likely that the communication might cause the patient's death.

These sections are clear in themselves and require little comment.

The question of "benefit and good faith" does not come into Section 87 ; it is merely necessary that the person harmed should be above the age of 18 years, and shall have consented to suffer harm or to take the risk of harm ; and that the act done should not be intended or be known to be likely to cause death or grievous hurt.

So where the accused inflicted wounds on his mother as the result of a conspiracy to impute the offence to a faction opposed to them and the mother died after some days (after

having recovered in the meanwhile) not in consequence of the wounds which were not severe, it was held that neither the offence of attempt to murder nor that of grievous hurt had been committed, and that the accused could not be convicted of hurt since the wounds were inflicted with the consent of the deceased.

(*Reg v. Muhammad Amanji*, 8 B. H. C. Cr. 110, 1871.)

And when the deceased, a middle aged man, believed himself to have been rendered *da* proof by charms, and asked the accused to try a *da* on his right arm, and the accused believing in the claim of the deceased inflicted a blow with a *da* with moderate force with the result that the arteries were cut and the deceased bled to death, it was held that the case was governed by Sections 87 and 90; the deceased gave his consent under misconception of facts, but it could not be said that the accused knew of this misconception or had reason to believe that the deceased was mistaken in thinking himself invulnerable.

(*Ngwa Shwe Kin v. Emperor*, 16 Cr. L. J. 581=30 Ind. Cas. 133=8 L. B. R. 166=8 Bur. L. J. 241, 1915.)

In the case of death caused by the bite of a venomous snake received by the deceased's own act through the alleged instigation of a snake charmer, the question to be answered is whether the snake charmer knew or had reason to believe that the consent was given in consequence of a misconception of fact.

(*Queen-Empress v. Nga Po Kyin*, U. B. R. 1897—1901, Vol. 1, 298.)

If it is found that the consent was founded on a misconception of facts, that is in the belief that the accused had power by charms to cure snake bites, and that the accused knew that the consent was given in consequence of such misrepresentation, then such consent would not protect the accused.

(*Queen v. Poonai Fattemah*, 12 W. R. Cr. 7=3 B. L. R. Cr. 25). See pages 105 and 106.

The term "in good faith" is not positively defined in the code. There is only the negative definition in Section 52:—"Nothing is said to be done or believed in good faith which is done or believed without due care or attention."

So in a case where an ignorant *kobiraj* operated upon an old feeble man for external piles by cutting them out with a

common clasp knife after pulling them down with a hook, and the man bled to death, it was held that the accused could not claim the benefit of Section 88, and the patient could not be held to accept a risk of which he was not aware, and the accused could not be considered to have acted in good faith inasmuch as he had not acted with due care and attention. (*Sukaroo Kobiraj v. Empress*, 14 C. 566.)

And a man is not protected under Section 88 who has sexual intercourse with a girl a little over 12 years of age with her consent, and thereby causes grievous hurt to her. (*Emperor v. Mohammad Miyan*, 12 C. P. L. R. 11).

In a case where the accused severely beat a woman under 18 years of age with sticks for exercising a spirit out of her with the consent of the woman and her father, and the beating resulted in her death, it was held that the accused were not entitled to the benefit of Section 84 or 88.

(*Queen-Empress v. Jamaluddin*, Rat. Un. Cr. C. 603.)

The expression "under a misconception of fact" in Section 90 is broad enough to include all cases where the consent is obtained by misrepresentation; the misrepresentation should be regarded as leading to a misconception of the fact with reference to which the consent is given. A misrepresentation as to the intention of a person is a misrepresentation of fact.

(*In re N. Jaladu*, 36 M. 453; *Crown v. Mussammat Soma*, 17 P. R. 1916.)

Section 94.

Section 94. Except murder, and offences against the State punishable with death, nothing is an offence which is done by a person who is compelled to do it by threats which, at the time of doing it, reasonably cause the apprehension that instant death to that person will otherwise be the consequence:

Provided the person doing the act did not, of his own accord or from a reasonable apprehension of harm to himself short of instant death, place himself in the situation by which he became subject to such constraint.

Explanation 1.—A person who of his own accord, or by reason of a threat of being beaten, joins a gang of dacoits knowing their character, is not entitled to the benefit of this exception, on the ground of his having been compelled by his associates to do anything that is an offence by law.

Explanation 2.—A person seized by a gang of dacoits, and forced by threat of instant death to do a thing which is an offence by law—for example, a smith compelled to take his tools and to force the door of a house for the dacoits to enter and plunder it—is entitled to the benefit of this exception.

Section 94 is the only law which allows the doer of a crime to plead necessity as a defence. In order that the doctrine may be applicable, there must be a reasonable fear at the very time of instant death. The Indian Law about compulsion and necessity as a justification of an act otherwise criminal is based on the law of England. The law does not, where there is no fear of instant death, require the Courts to discuss the philosophy of free-will.

(Emperor *v.* Magan Lal, 14 B. 115, 1889.)

When a person is induced by threats of death to do an act to enable the accused to commit a murder, he cannot claim the benefit of Section 94, which does not apply to cases of murder, and he is an accomplice.

(Killikyatara Bomna *v.* Emperor, 1108 M. W. N. 1912 = 19 Ind. Cas. 207 = 14 Cr. L. J. 107).

Nothing but fear of instant death is a defence for a policeman who tortures a man or woman by superior order.

(Queen-Empress *v.* Latif Khan, 20 B. 394, 1895).

Section 95.

Section 95. Nothing is an offence by reason that it causes, or that it is intended to cause, or that it is known to be likely to cause, any harm if that harm is so slight that no person of ordinary sense and temper would complain of such harm.

This section has been referred to in Chapter v. when dealing with offence of causing simple hurt, and further comment is unnecessary.

CHAPTER XI.

GENERAL EXCEPTIONS, SECTIONS 96—106.

THE RIGHT OF PRIVATE DEFENCE.

96. Nothing is an offence which is done in the exercise of the right of private defence.

97. Every person has a right subject to the restrictions contained in Section 99 to defend—

Firstly, his own body and the body of any other person against any offence affecting the human body ;

Secondly, the property, whether moveable or immoveable, of himself or of any other person against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass.

98. When an act, which would otherwise be a certain offence, is not that offence by reason of the youth, the want of maturity of understanding, the unsoundness of mind, or the intoxication of the person doing that act, or by reason of any misconception on the part of that person, every person has the same right of private defence against that act which he would have if the act were that offence.

ILLUSTRATIONS.

(a) Z, under the influence of madness, attempts to kill A ; Z is guilty of no offence. But A has the same right of private defence as he would have if Z were sane.

(b) A enters by night a house which he is legally entitled to enter. Z in good faith, taking A for a house breaker, attacks A. Here Z by attacking A under this misconception commits no offence. But A has the same right of private defence against Z, which he would have if Z were not acting under that misconception.

99. There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt if done, or attempted to be done, by a public servant acting in good faith under colour of his office, though that act may not be strictly justifiable by law.

There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done by the direction of a public servant acting in good faith under colour of his office, though that direction may not be strictly justifiable by law.

There is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities.

The right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence.

Explanation 1.—A person is not deprived of the right of private defence against an act done, or attempted to be done, by a public servant as such, unless he knows, or has reason to believe that the person doing the act is such public servant.

Explanation 2.—A person is not deprived of the right of private defence against an act done or attempted to be done by the direction of a public servant, unless he knows, or has reason to believe, that the person doing the act is acting by such direction; or unless the person states the authority under which he acts, or, if he has authority in writing, unless he produces such authority if demanded.

100. The right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions hereinafter enumerated, namely:—

Firstly—Such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault.

Secondly—Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault.

Thirdly—An assault with the intention of committing rape.

Fourthly—An assault with the intention of gratifying unnatural lust.

Fifthly—An assault with the intention of kidnapping or abducting.

Sixthly—An assault with the intention of wrongfully confining a person under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release.

101. If the offence be not of any of the descriptions enumerated in the last preceding section, the right of private defence of the body does not extend to the voluntary causing of death to the assailant, but does extend, under the restrictions mentioned in Section 99, to the voluntary causing to the assailant of any harm other than death.

102. The right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence, though the offence may not have been committed, and it continues as long as such apprehension of danger to the body continues.

103. The right of private defence of property extends, under the restrictions mentioned in Section 99, to the voluntary causing of death or of any other harm to the wrong-doer, if the offence the committing of which, or the attempting to commit which, occasions the exercise of the right, be an offence of any of the descriptions hereinafter enumerated, namely,—

Firstly—Robbery.

Secondly—House breaking by night.

Thirdly—Mischief by fire committed on any building, tent or vessel which building, tent or vessel is used as a human dwelling, or as a place for the custody of property.

Fourthly—Theft, mischief or house trespass, under such circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence, if such right of private defence is not exercised.

104. If the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right of private defence be theft, mischief or criminal trespass not of any of the descriptions enumerated in the last preceding section, that right does not extend to the voluntary causing of death, but does extend, subject to the restrictions mentioned in Section 99, to the voluntary causing to the wrong-doer of any harm other than death,

105. The right of private defence of property commences when a reasonable apprehension of danger to the property commences.

The right of private defence of property against theft continues till the offender has effected his retreat with the property or either the assistance of the public authorities is obtained or the property has been recovered.

The right of private defence of property against robbery continues as long as the offender causes or attempts to cause to any person death or hurt or wrongful restraint, or as long as the fear of instant death, or of instant hurt, or of instant personal restraint continues.

The right of private defence of property against criminal trespass or mischief continues as long as the offender continues in the commission of criminal trespass or mischief.

The right of private defence of property against house breaking by night continues as long as the house trespass which has been begun by such house breaking continues.

106. If in the exercise of the right of private defence against an assault which reasonably causes the apprehension of death the defender be so situated that he cannot effectually exercise that right without risk of harm to an innocent person, his right of private defence extends to the running of that risk.

ILLUSTRATION.

A is attacked by a mob who attempt to murder him. He cannot effectually exercise his right of private defence without firing on the mob, and he cannot fire without risk of harming young children who are mingled with the mob. A commits no offence, if, by so firing, he harms any of the children.

The question of the right of private defence so far as it is connected with the law of rioting has been discussed in the chapter on Rioting. The chief aspects there dealt with are the right of private defence of property against persons, who try wrongfully to dispossess peaceful occupants, and that portion of Section 99 which enacts that there is no right of private defence of property in cases in which there is time to have recourse to the protection of the public authorities. The first two clauses of Section 99 have been dealt with in the chapter discussing assaults on and hurt caused to public servants.

Reference should be made on these points to those chapters.

The last clause of Section 99 enacts that the right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence, and with this clause must be read the second exception to Section 300, which enacts that "culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence."

This exception was not discussed in the chapter dealing with these special exceptions, as it was not possible to treat it apart from the general question of private defence. It will therefore be included in this chapter.

PRIVATE DEFENCE OF PERSON.

In order to establish a plea that an act of killing is justifiable homicide in the exercise of the right of private defence and not culpable homicide, it must be proved—(1) that the deceased attacked the accused and that the assault was an offence, (2) that it was such as might reasonably cause an apprehension that death or grievous hurt would be the consequence of such assault, unless he, the accused, exercised his right of private defence, (3) that voluntarily causing the death of his assailant was necessary for the purpose of defence.

(*Hakim v. Empress*, 41 P. R. 1884.)

In *Crown v. Kureem Bakhsh*, 13 P. R. 1868, it was held that when a person fired his gun at another who was attacking him with a large club, his act was not a legal exercise of his right of private defence, as it was not necessary for his defence that he should use force, as he had only to stand back and let the deceased alone, and he was safe. The accused had been interfering to prevent the deceased from committing a cattle trespass.

This theory was expounded in greater detail by Lindsay, J., in *Empress v. Josef Castorati*, 36 P. R. 1879:—

"The right of private defence is subject in all cases to the restrictions contained in clauses 3 and 4 of Section 99. Harm may only be inflicted when it is absolutely necessary to inflict

harm for the purpose of defence, and no more harm may be inflicted than is necessary for the purpose of defence. The infliction of harm should be avoided, if it can be avoided without bodily danger to the person assaulted. 'The principle of the right is that it shall only be exercised when and so far as is necessary' (Mayne). This is a reasonable conclusion from a careful consideration of clauses 3 and 4 of Section 99. No man has the right to take the law into his own hands, if by any means he can protect himself and obtain justice otherwise. For instance if A point a pistol at B with the intention of shooting B, B would not be justified in shooting A, if he without danger to himself could run round the corner or put up a shield.

"If A and B rush on C with lethal weapons, intending to kill C, and C has the opportunity of jumping into a closet at hand, and so protect himself by getting away from his assailants, he would not be justified in harming A and B, though he may reasonably have apprehended danger to his body from the attack; and so in the defence of the body of any other, if the other person can be protected without danger by means other than violent, violence should not be employed. The harm that may be inflicted is for the purpose of defence; and if defence be not necessary, that is, if the body can otherwise be protected, harm may not be exercised.

"Lastly, when the defence is that the party was about to commit such a crime as would justify his death, this must be proved, not indeed so as to establish the fact conclusively, but so as to prove that the accused had such grounds for supposing violence was intended as would warrant a rational man in so acting ; and he must also prove that the offence about to be committed could not have been prevented by milder means."

It is doubtful whether the law should be so strictly interpreted. For instance in *Hafiz Ali v. King-Emperor*, 10 O. C. 196 = 6 Cr. L. J. 271, it was held that when a person is attacked while doing a lawful act, he is entitled to stand his ground and defend himself and that the law does not intend that he must run away to have recourse to the protection of the public authorities. The accused in this case, apprehending opposition, had gone armed to appraise crops and on the arrival of the opposite party, similarly armed, had not waited to be attacked, but had gone out to meet their opponents. It was held that, as there was a threat to attack they had acted within their rights of private defence.

The following passage from Mayne is cited with approval in 28 M. 454 :—

"A man who is assaulted is not bound to modulate his defence step by step according to the attack before there is reason to believe the attack is over. He is entitled to secure his victory as long as the contest is continued. He is not obliged to retreat but may pursue his adversary till he is out of danger ; and if in a conflict between them, he happens to kill, such killing is justifiable. And, of course, when the assault has once assumed a dangerous form, every allowance should be made for one, who with the instinct of self-preservation strong upon him, pursues his defence a little further than to a perfectly cool bystander would seem absolutely necessary. The question in such cases will be not whether there was an actually continuing danger, but whether there was a reasonable apprehension of such danger."

So a person will be justified in the exercise of his right of private defence of his person in stabbing his assailant, when the latter attacks him with a knife inflicting a serious wound, even though he may have escaped further injury by resorting to less violence or by running away.

(*Alingal Kunhinayan v. Emperor*, 28 M. 454.)

So also in a case when the deceased S and three others attacked with *lathis* the accused B and two others ; and one of the deceased's party struck a blow on the accused which felled him to the ground, and the accused rose up and fractured S's skull; it was held that under the circumstances the accused did not exceed his right of private defence, as the circumstances were such as reasonably caused the apprehension that grievous hurt would, but for his action, have been the consequence of the attack that was being made upon him. A man in the predicament of the accused could not be expected to judge too minutely

(*Bhut Nath Dome v. King-Emperor*, 13 C. W. N. 1180 = 3 Ind. Cas. 867 = 10 Cr. L. J. 391.)

When L and others made an assault upon P and others, who stood up against L's party to fight and were consequently convicted of rioting, it was held that P's party had committed no offence as they acted in the exercise of their right of private defence.

(*Pokhar v. King-Emperor*, 10 P. W. R. 1907 = 5 Cr. L. J. 218.)

A person who is attacked by another with a spear; and who in self-defence strikes a blow with a *lathi*, which results in the death of the party attacking, does not exceed the right of private defence of person and property and such right extends to the taking of life where grievous hurt is reasonably apprehended.

(Queen v. Moizuddin, 11 W. R. Cr. 41.)

In a case where the accused, husband and wife, in attempting to protect the latter from rape by the deceased, killed him, it was held that the right of private defence extended to the causing of death in such a case and no offence was committed.

(Queen-Empress v. Janu, Rat. Un. Cr. C. 867, 1896.)

When danger to the person of the accused was imminent and the evidence showed that he had no time to seek the aid of the public authorities, it was held that he was entitled to use all force necessary to repel the attack, even to the extent of firing a gun at his assailants. Such acts for repelling the attack do not amount to a criminal offence, nor are the persons aiding him in such acts guilty of being members of an unlawful assembly.

(*In re* Pachai Gounden, 15 Cr. L. J. 710 = 26 Ind. Cas 158, 1914.)

An assault on a woman by pulling her hair and hand in the presence of several persons is calculated to outrage the woman's modesty and is punishable under Section 354. A person who sees a woman being assaulted in this manner, is justified in going to her assistance and even in cutting another person with a *da*, if that person interferes to prevent him.

(Mi Hla So v. Nga Than, 4 Bur. L. T. 268 = 13 Cr. L. J. 53 = 13 Ind. Cas. 389, 1912.)

When the accused, a coolie, was charged under Section 352 with using force to a peon in the *Mamlatdar's* office, who prevented his running away from service, it was held that no offence was committed, since the accused had a right to defend himself from the illegal act of the peon in wrongfully restraining him.

(Queen-Empress v. Ganpati, Rat. Un. Cr. C. 605, 1892.)

In a case where the deceased, a sturdy and dissolute young man, upon a quarrel with the accused, his uncle and his uncle's son, aged seventy and thirty-five, after an exchange of abuse, snatched up a heavy *jatu*, three feet long, and aimed

a blow with it at his uncle and possibly another at his uncle's son, and the uncle's son seized a second *jatu* two feet long, and struck the assailant twice on the head with it so that he died; it was held that there was no excess of the right of private defence and no offence had been committed.

(Puran v. King-Emperor, 8 P. L. R. 1906^{—3} Cr. L. J. 232.)

When the tenants of a *sahukar* zamindar went to his house in a body to make some sort of demonstration and perhaps to seize the cotton crop, and some of them had weapons, and the zamindar apprehending hurt to himself, fired off his gun in the direction of the crowd, without any intention of killing anyone or doing more harm than was necessary for the purposes of defence, it was held that what the *sahukar* did was done in the exercise of his right of private defence, and he was entitled to the benefit of any doubt which existed.

(Lachman Das v. Emperor, 14 P. W. R. 1915 = 131 P. L. R. 1915 = 27 Ind. Cas. 216 = 16 Cr. L. J. 152.)

When the accused went armed with a *lathi* to protect his son and nephew from the deceased, and exchanged abusive language with the deceased; and the deceased then struck the accused on the head with a *lathi* and the accused returned the blow, and the deceased, on falling, was struck a second blow by another accused person, it was held that the accused's right of private defence extended even to causing the death of his assailant notwithstanding that he had a friend armed with a *lathi* at his side. "In riots it frequently happens that a man sustains grievous hurt or is killed, notwithstanding that men on the same side are close at hand, and are armed with deadly weapons."

(Empress v. Bisambhar, 135 A. W. N. 1886.)

In a case where the accused, who was a public servant acting in the execution of his duty, had his conveyance stopped by a number of camel-drivers whose camels were trespassing on the canal bank, and from his custody a prisoner who had been legally arrested was either forcibly rescued or enabled to escape; it was held that the accused had every reason to believe that he was about to be subjected to personal violence; and that if in the scuffle he either let off his gun by accident or fired it without any careful aim at his assailants to screen his own safety he was entitled to acquittal, because if the gun

went off by accident, there was no offence; if he fired it under the circumstances noted above, he was entitled to acquittal under Section 101.

(*Mukerji v. Queen-Empress*, 5 P. R. 1901).

Accused was struck by deceased with a stick. He ran away, and was pursued by deceased and two others. When rounded up, he struck the deceased with a knife and killed him. It was held that accused had good reason to suppose that, unless he used his knife, grievous hurt at least, if no death, would be inflicted upon him, and that therefore he could not be said to have exceeded his right of private defence.

(*Yusaf Khan v. Emperor*, 1 P. W. R. 1920 = 2 P. L. R. 1920 = 55 Ind. Cas. 607).

If a man is being lawfully pursued with a view to arrest, he cannot set up a right of private defence unless a reasonable apprehension of danger to himself arises from an attempt or threat to kill him. Under Section 59, Cr. P. C., any private person may arrest any person who in his view commits a cognisable and non-bailable offence; and under Section 46, Cr. P. C., when such an arrest is resisted or sought to be evaded, he may use all means necessary to effect the arrest. If the pursuer persists in his effort to arrest even if the person to be arrested is armed, that person cannot in turn set up the plea of self defence.

(*Queen-Empress v. Nga Taung*, L. B. R. 1893-1900, 136).

So also when a Police officer called upon the accused who were armed with guns, and whom he believed to be dacoits, to surrender, but the accused resisted and fired several shots, wounding and killing several persons, it was held that Police Sergeant was justified in his act under Sections 45 (6) and 54, (1), Cr. P. C., and the accused had no right of private defence.

(*Bhang Singh v. Empress*, 21 P. R. 1900).

RIGHT OF PRIVATE DEFENCE OF PROPERTY.

It is not always easy to distinguish between the right of private defence of person and that of property. In cases where a party comes upon land in the possession of others both to take possession of the land and to attack them, the right of private defence of person arises almost simultaneously with the right of private defence of property (*In re Ponthala Narisi Reddi*, 15 Cr. L. J. 447 = 24 Ind. Cas. 327).

In the case of robbery the causing of death may be justified as an act done in reasonable and necessary self defence under certain circumstances and conditions, but in such cases the measure of self defence must always be relevant and proportionate to the *quantum* of force used, and which it is necessary to repel. The Indian Penal Code does not provide that in every case where a robbery is committed the person attacked is entitled to cause death. It means no more than this, that robbery by violence may be resisted by violence sufficient to overcome the force employed by the attacker, and that if in the exercise of that right death is caused, it may be justified if it is reasonably and properly asserted in defence of property.

(*Ramprasad Mahton v. Emperor*, 4 Pat. L. J. 289 = 50 Ind. Cas. 983 = 20 Cr. L. J. 375).

I cite below (A) cases in which it has been held that the right of private defence of property existed.

(B) cases in which it was held that no such right existed.

(A) (i) *Hira Singh v. Crown*, 26 P. R. 1872.

The accused in arresting a party of thieves struck one of them a blow in the ribs and other blows which caused his death. It was held that there was no proof that an excess of force had been used, or who used it, and therefore the conviction was set aside.

(ii) *Pudu v. Emperor*, 10 N. L. R. 38 = 15 Cr. L. J. 352 = 23 Ind. Cas. 704.

A tenant did not object to the Malguzar entering upon the land, but he objected to the removal of a tree growing thereon after its severance from the ground by the action of the wind, and the Malguzar used force, but not more than was justified by law, to protect his rights over the tree. It was held that the Malguzar, as owner of the tree, had under Section 98 a right of private defence against the tenant when the latter attempted to remove the tree by cutting it and stacking it with a view to appropriating it for himself.

(iii) *Ram Harakh v. Emperor*, 15 Cr. L. J. 436 = 24 Ind. Cas. 172.

Some country carts containing the camp luggage of a Deputy Commissioner were on their way in charge of an orderly, a constable and some chaprassis. While on their way one of the carts stuck in a rut and the orderly and the chaprassis took hold of the bullocks of the accused against their will, yoked them to the cart, and dragged it out of the rut. The accused then forcibly unyoked their bullocks and took them away. They were convicted under Section 147. It was held that the orderly and his companions could not be regarded under Section 99 as public servants acting in good faith under colour of their office, and the accused were justified in their action by the right of private defence. It was also held that the act of the orderly and his companions technically amounted to theft under Section 378, and the right of private defence of the accused continued under Section 105 till the recovery of the bullocks, and did not cease with the yoking of the bullocks to the cart.

(iv) *Nga Hla T'un U v. Queen-Empress*, L. B. R. 1893—1900, 219.

The law must not be invoked to oppress persons who, when there is no time to have recourse to the public authorities, find themselves in a position in which they must either exert the privilege of private defence as provided and restricted by law, or submit to a forcible invasion of person or property in cases where under Section 97 the law does not require any such submission.

(v) *Regula Bheemappa v. Emperor*, 26 M. 249 (1903).

Persons belonging to a village went in procession to worship a goddess in an adjoining village, carrying with them a pot of consecrated water. When returning after performing their acts of devotion they were attacked by the people of that village, and the attack was resisted violently, causing simple hurt to some persons and grievous hurt to one of them. It was held that they were acting legally in carrying the water in the pot, and were justified in exercising the right of private defence of body and of property and in resisting the villagers in the obstruction they offered in the carrying of the pot of water. It was held that they had not inflicted more harm than it was necessary under the circumstances to inflict for the purpose of self defence.

(vi) *Queen-Empress v. Shamsher Khan*, 170 A. W. N. 1896.

When the accused found some others taking away moveable property in which they were interested, it was held that they had a right to reclaim the same by force when it appeared that the property would have been carried off if they had merely applied to the Police for help.

(vii) Queen v. Guru Charan Chang, 6 B. L. R. Ap. 9 = 14 W. R. Cr. 69.

The prisoners in resisting a sudden attack made on them by certain persons for the purpose of cutting their crops, and when they had no time to complain to the Police, inflicted a wound on one of them with a bamboo, from the effects of which the man died. It was held that the force used or the injuries inflicted were not such as to exceed their rights of private defence of property.

(viii) Queen v. Dhaumun Teli, 20 W. R. Cr. 36.

When a person trespassed into the house of another for having criminal intercourse with the latter's wife, and the latter, with the assistance of his friend, retaliated violently, it was held that he had committed no offence, as he was justified in causing any harm short of death to a person committing house trespass.

(ix) Queen v. Mokee, 12 W. R. Cr. 15.

An accused whose property had frequently been stolen went out with a *lathi* to watch his property, and with the *lathi* struck a thief who died in consequence of the blows. It was held, having regard to the nature of the injuries and the subsequent conduct of the accused, that the case did not fall within the 4th exception to Section 99, and that the prisoner was not guilty of culpable homicide not amounting to murder, but was protected by Sections 97 and 104, and had not transcended the limits of the right of private defence of property.

(x) Jarha Chamar v. Surit Ram, 3 N. L. R. 177 = 7 Cr. L. J. 49.

In this case a thief had stolen some crops, but placed them on a common threshing floor of the village, and the accused, the owner of the crops, entered the threshing floor with a number of villagers and carried away the crops.

(xi) Gorie Sankar v Emperor, 18 Cr. L. J. 862 = 41 Ind. Cas. 830.

If two persons commit house trespass by invading another person's house, the occupier is entitled forthwith to eject them and to use reasonable force for the purpose. The infliction of simple hurt on the invaders is within the limit prescribed by Section 99.

(B) Cases in which there was no right of defence.

(i) Bag v. Emperor, 29 P. R. 1902.

The accused was watching his field, the grain of which had on previous occasions been stolen; he saw a thief cutting corn in it, and gave chase. The thief ran his head against a tree and fell. The accused hit him recklessly with a stick while on the ground and fractured his skull in two places, causing death. The thief, when he fled, did not carry any corn with him. It was held that the right of private defence of property and the right of arrest provided by Section 59 read with Section 46 of the Cr. P. C. were exceeded by the accused, who must have known that he was likely to cause death, and that he was guilty of an offence under Section 304 (second part).

(ii) Empress v. Gulbadan, 25 P. R. 1885.

The accused at night found a man in his field stealing melons. On his challenging him, the man made no answer, but ran away. The accused pursued him into a deserted village, and coming up with him struck him a blow on his cheek with a sword, and, when the man suddenly turned round, supposing that the man might lay hold of his sword or stab him with a knife, inflicted another wound which proved fatal.

It was held that as it was found that the deceased was not carrying off any stolen property, and there was nothing to show that the accused was under the impression that he was doing so, Section 105 did not apply, and the right of private defence of property did not continue till the wounds were inflicted.

Nor had the right of private defence of the body arisen, as it was not alleged that the deceased, who was found to have been unarmed at the time, either attempted or threatened to commit an offence such as to cause reasonable apprehension of danger to the body. The supposition of the accused that the deceased had a knife was not enough to give rise to any right of private defence in the absence of any threat or attempt to draw a knife for the purpose of attack. The offence was therefore murder.

(iii) *Mammun v. Crown*, 35 P. R. 1916.

Six persons went on a moonlight night armed with *chavis* and *dangs* and assaulted two persons who were cutting the rice crop. One was killed on the spot.

It was held that having regard for Sections 97, 103, 99 (4) it was clear that the accused had inflicted more harm than was necessary for the purpose of defence of their property. It was held further that it was impossible to hold that the accused did not intend to cause more harm than was necessary for the defence of their property, and from this it followed that they, in using violence to the deceased, did not act in good faith though they exceeded their rights, and consequently exception 2 of Section 300 was not applicable, and they were guilty under Section 302.

(iv) *Bhai Lal Choudhry v. Emperor*, 29 C. 417.

A Magistrate issued a proclamation under Section 87 and an order for the attachment of the property of certain absconders. In the course of the attachment an objection was raised by another person that the property attached did not belong to the absconders. The Police officer, being informed by the patwari that it was the property of the absconders, proceeded to make the attachment. Then certain persons, including the accused, combined to overawe the Police officer. It was held that the rightful owner had no right of private defence of his property even supposing that the absconders were not the rightful owners, inasmuch as the Police officer was acting in good faith and under colour of his office.

(v) *Mt. Siryan v. Crown*, 69 P. L. R. 1916 = 17 Cr. L. J. 270 = 34 Ind. Cas. 990.

The deceased came with a pitchfork in his hand and abused the sister of the accused; the accused, exasperated by the attack on the latter, in a moment of anger and without premeditation struck the deceased on the head, causing him a

fatal injury. The accused was convicted under Section 304, Part II. It was contended that the accused acted in the exercise of the right of private defence, and in any case she could only be convicted of causing grievous hurt. It was held that the right did not extend to the causing of the deceased's death, but the conviction should only be maintained for the offence of grievous hurt.

(vi) Queen v. Gokool Bowree, 5 W. R. Cr. 33.

The offence committed was murder when the death of a weak half starved old woman, who was detected stealing, was caused in the exercise of the right of private defence by the doing of more harm than was necessary for the purpose of such defence.

(vii) Thekumthatathil Kelukatti v. Emperor, 13 Cr. L. J. 782 = 17 Ind. Cas. 414.

When accused fired at a person in the mistaken belief that he was a thief, and it was found that he had no reason to apprehend anything more serious than the theft of certain fruit, it was held that he was not entitled to the benefit of Exception 2 of Section 300.

The following are cases in which Exception 2 of Section 300 has been applied. For the application of this exception it is necessary to show, first, that the accused had a right of private defence; secondly, that in exceeding that right and causing death he had acted in good faith in the exercise of the right and without premeditation and without any intention of doing more harm than was necessary for the purposes of defence:—

(i) Farid v. Emperor, 12 Cr. L. J. 81 = 9 Ind. Cas. 452, (1911).

The accused, who was concealing himself from the Police, was seized by the deceased and two others, and in order to rescue himself he struck the deceased two severe blows on the head and shoulder with an axe which he had in his hand at the time. It was held that the accused exceeded his right of private defence in that he caused more harm than was necessary to resist the unauthorized attempt of the deceased to place him in confinement.

(ii) *In re Kayambu Tevan*, 17 Cr. L. J. 78 = 32 Ind. Cas. 670 (1916).

A proclaimed offender was tried for murdering a Police officer trying to arrest him. The prosecution failed either to file the statement referred to in clause 3, Section 87, of the Cr. P. C. or to adduce any other evidence of publication. It was held that the accused was entitled to the benefit of sub-section (2) of Section 300, and was guilty of culpable homicide not amounting to murder.

(iii) *Nga Tun v. Emperor*, 17 Cr. L. J. 335 = 35 Ind. Cas. 511 (1916).

The right of private defence may arise when a person sees a man approaching him with a stick trailing in his hand, for he might expect the man to hit him with the stick. But when such a person claiming the right has another companion by his side who is himself properly armed, he should at least call on the person approaching him with the stick to drop his stick before resorting to such a dangerous mode of exercising his right as firing a shot.

Firing without giving such warning would be exceeding the right of private defence.

In a case of this kind a long term of imprisonment is not called for. Leniency may well be shown where the accused has acted in good faith for the protection of his person or property, and has erred only in the degree of force or violence used and in acting too hastily.

(iv) *Nga Tun Nyein v. Emperor*, 18 Cr. L. J. 284 = 38 Ind. Cas. 316 (1917).

When a man was chased by a number of people, and on the accused trying to stop him running away beat him on the head with a bamboo, it was held that the accused was not justified in stabbing him in the neck so as to give a fatal blow, and in doing so he exceeded his right of private defence, and was liable under the first part of Section 304.

(v) *Emperor v. Sher Baz*, 1 P. R. 1880.

Accused was, on a cry of "thief thief" being raised against him, pursued by certain private persons in whose view he had not committed any non-bailable or cognizable offence; whereupon he tried to shoot dead one of his pursuers who

was on the point of seizing him. It was held that the offence was one of culpable homicide not amounting to murder, as the accused, though he was entitled to resist the attempt of his pursuers to capture him in the exercise of his right of private defence, had exceeded the power given him by law when he caused the death of the person against whom he was exercising that right, but without any intention of doing more harm than was necessary for the purpose of defence.

(vi) Queen v. Fukeera Chamar, 6 W. R. Cr. 50.

Prisoner found deceased in the act of house-breaking by night in his house and killed him with a sort of pole-axe which was near him. It was held that he had inflicted more hurt than was necessary for the purpose of self defence, and was guilty of culpable homicide not amounting to murder.

(vii) *In re Garuga Rammaya*, 8 M. L. T. 462 = 8 Ind. Cas. 1088 = 12 Cr. L. J. 18 (1911).

Deceased and some of the prosecution witnesses had trespassed by night into the house of the accused, and were dragging him outside the house. He was entitled to defend himself against them, but when he stabbed the deceased and caused grievous hurt to another, his assailants being unarmed, and there being nothing to suggest that he had any reason to believe that he was in danger of death or grievous hurt, it was held that he had exceeded the right of private defence, but was within the second exception.

Section 105.

It seems strange that there appear to be no rulings discussing the second clause of Section 105 and the meaning of the phrases "till the offender has effected his retreat with the property, or either the assistance of the public authorities is obtained or the property has been recovered."

In the first Report on the Penal Code by the Indian Law Commissaries 1846, Section 158, it is written:—"We are not sure of the meaning intended by the expression 'till the offender has effected his retreat with the property'. We know not certainly when he is to be considered as having effected his retreat, probably it is when he has once got clear off, having escaped immediate pursuit, or pursuit not having been made. We presume that the protection of parties pursuing robbers, etc., for the recovery of property which they have succeeded

in carrying off, or for bringing them to justice, was thought not to be within the scope of the provisions touching the right of private defence."

The clause "or either the assistance of the public authorities is obtained" did not exist in the draft Code, and it was suggested by the Law Commissaries, Section 156, that the privilege of the clause should operate till the offender is taken and delivered to an officer of justice.

The question is well discussed in The Law of Crimes of Ratan Lal and Thakore (8th Edition, p. 204), and I take the liberty of quoting their remarks: The following passage is cited from Morgan and Macpherson's Indian Penal Code:—

"A recapture of the plundered property, while it is in the course of being carried away, is authorised, for the taking and retaking is one transaction. But when the offence has been committed and the property removed, a recapture after an interval of time by the owner or other person on his behalf, however justifiable, cannot be deemed an exercise of the right of defence of property. The recovery which the section contemplates seems to be a recovery either immediate or made before the offender has reached his final retreat, as where stolen cattle are tracked until ultimately overtaken in their retreat and recaptured." The Commentary then continues:—"But Mayne is of opinion that resistance within justifiable limits may be continued as long as the wrongful act is going on. But when the robber, for instance, has made his escape, the principle of self defence would not extend to killing him if met on a subsequent day. If, however, the property were found in his possession, the right of defence would revive for the purposes of its recovery. This view seems to be correct, otherwise the expression "or the property has been recovered" has not much meaning in it. There is no decided case of any of the High Courts on this point. It will therefore be observed that while in all other cases the right only exists for the purpose of prevention of the offence named, in the particular case of theft the right continues for the recovery of the property even after the theft has been accomplished. The extent of that right is that mentioned in Section 104. The right and its extent being thus found, every case must thereafter be judged on its own particular facts to decide whether or not the exercise of the right in the recovery of the stolen property has been exceeded. Here the exceptions contained in Section 99 come in: If A runs away with

B's watch, B may chase him till he effects his escape, but the right of self defence does not end with the escape. If B sees A in the street the next day, the next month, or the next year wearing the stolen watch, B may forthwith seize A and recover his watch, using for the purpose as much force as the case allows. If a policeman should be at hand, the proper course would be to hand A over to him, and let him recover the watch. But B is not bound to put off the capture of A until he can find assistance from public authority. Again, supposing that on a day after the theft thereof B sees his watch lying on a table in a house or garden, if he can get the assistance of a policeman without losing sight of it, no doubt he would be bound to do so. But he would be under no legal obligation to risk a further loss or removal of the stolen property for the purpose of having recourse to the public authorities. If the circumstances are such that immediate seizure seems to offer the only reasonable prospect of recovery, B is entitled to enter the house or garden and recover his watch. The capture of the thief would not be an assault in the one case, and the entry into the house or garden would not be criminal trespass in the other."

This theory was adopted in *Jarha Chamar v. Surit Ram*, 3 N. L. R. 177 = 7 Cr. L. J. 49, wherein it was held that when a person whose property has been stolen finds the thief or the property, he is not bound to put off his capture of the thief or the property until he can find assistance from public authority.

Under the fourth clause of Section 105 the right of defence against criminal trespass or mischief continues only as long as the offender continues in the commission of criminal trespass or mischief; therefore when the act of mischief ceases, the right of private defence ceases (*Queen v. Raj Kisto Das*, 12 W. R. Cr. 43).

Under the fifth clause the right of private defence of property against house-breaking does not extend to causing the death of the house-breaker when he has made his escape from the premises empty handed, and is at some distance from the place. No more harm should be done than is necessary to effect his capture.

(*Queen v. Bolaki Jolahad*, 1 B. L. R. S. N. 8 = 10 W. R. Cr. 9).

Plea of self defence.

In *Pasupat Gope v. Ram Bhajan Ojha*, 1 C. W. N. 545, it was held that when the accused pleads not guilty, but the accused's pleader advances the plea of right of private defence, the duty of the Court is to accept the plea advanced before it, and to say upon the entire facts of the case if any offence, and what offence, has been committed.

Similarly in *in re Kalicharan Mookerjee*, 11 C. L. R. 232, it was found that although Section 105 of the Evidence Act places on the accused the burden of proving that he has acted within his legal rights in the exercise of the right of private defence of property, still this burden can be discharged by the evidence of witnesses for the prosecution as well as by evidence for the defence on such a plea being set up, and the accused are clearly entitled to claim an acquittal if on the evidence for the prosecution it is shown that they have committed no offence.

In both these cases there was a plea of private defence set up, but in *Veerana Nadan v. Emperor*, 404 M. W. N. 1912=11 M. L. T. 251=15 Ind. Cas. 310=13 Cr. L. J. 470, and *in re Garuga Rammaya*, 8 M. L. T. 462=8 Ind. Cas 1088=12 Cr. L. J. 18, it was held that, even if the accused did not specifically plead private defence, he may be acquitted if the evidence showed that he was acting in self defence. This ruling was followed in *in re Pachai Gounden*, 15 Cr. L. J. 710=26 Ind. Cas. 158, where it was held that, if the circumstances show that the right of private defence was legitimately exercised, the Court should take it into consideration even though self defence was not specifically pleaded.

Apparently to the contrary, we have two rulings of the Allahabad High Court :—

In *Queen-Empress v. Timmal* 21, A. 122, it was held that when the plea of private defence of property was not raised by the appellant, and never could have been raised, having regard to the pleas put forward by him, he cannot raise such a plea for the first time in the Appellate Court.

In *Emperor v. Gullu*, 113 A. W. N. 1904=1 Cr. L. J. 427, it was held that when the accused did not themselves set up the plea of the right of private defence, and the evidence did

not suggest that the accused were acting in the exercise of such right, the Court could not set up such a defence on behalf of the accused.

In the latter case there was apparently nothing in the evidence of the prosecution to suggest that the right of private defence had been exercised, and therefore this ruling is not in conflict with the other rulings.

With reference to Timmal's case, it was written in Emperor v. Yusuf Husain, 40 A. 284, that the head note goes very considerably beyond anything that was decided in the case itself; and it was the contention that there was no evidence on the record upon which any circumstances could be inferred which would substantiate a plea of private defence, which found favour with the Court, and upon which the case was eventually decided.

It was held in this ruling that there is nothing in the law to prevent a man on his trial from setting up an alternative defence, first, that he was not present at the occurrence referred to by the prosecution witnesses, and that they were giving false evidence; secondly, that even if he failed to persuade the Court of this fact, he could show from the statements of the prosecution witnesses themselves that if he had caused the death of any person in the manner and under the precise circumstances deposed to by them, he was acting in the lawful exercise of a right of private defence.

Similarly the Patna High Court in Fandi Keot v. King-Emperor, 5 Pat. L. J. 64, held (following 19 C. W. N. 653 and 29 C. L. J. 571) that an accused person may plead the right of privae defence as an alternative plea after denying at the same time that he committed the offence charged against him.

CHAPTER XII.

A. Abetment.

It would be beyond the scope of this book to discuss in detail the law of abetment, and I propose only to cite some cases wherein the question of abetment of murder or hurt has been dealt with.

(i) *In re Appanna Hegade*, 1 Weir 52 (1899).

When a village magistrate, being present on an occasion on which a police constable was causing hurt to and wrongfully confining a person, did not attempt to interfere with or stop the criminal acts of the constable committed in his presence, nor did he report them to the Magistrate, it was held that he was guilty of the abetment of offences under Section 330 or 348, although there was no evidence to show that he actively instigated the police to commit the offence.

(ii) *Queen-Empress v. Latif Khan*, 20 B. 394 (1895).

A policeman who is present at the beating of prisoner by another policeman for the purpose of extorting a confession, and does not remonstrate with him, is guilty of the abetment of an offence under Section 330.

(iii) *Queen v. Esham Meah*, 12 W. R. Cr. 52.

A gave a *dao* to B who had given out his intention to coerce the party against whom he was acting, and who inflicted grievous hurt on such party with the *dao*. A was held to be guilty of abetment within the second head of the 3rd clause of Section 107.

(iv) *Empress v. Bakhtawar*, 24 P. R. 1882.

When an accused person asked a native doctor to supply her with medicine for poisoning her son-in-law the, act amounted to an instigation of the native doctor to abet the accused in committing murder punishable with reference to Section 108, Explanation 4, under Sections 116 and 302.

(v) *Queen-Empress v. Anant Puranik*, 25 B. 90 (1900).

If A asks B and others to come with him to commit dacoity, he instigates these men to dacoity just as much as if he asks them to go under some other leader. Similarly, if he asks B to ask C and others to join a dacoity, he bets the abetment of dacoity.

(vi) Emperor v. Sham Lal, 2 A. W.N. 1903.

An accused person who was present when a dacoity was planned, from whose huts the dacoits set out, and to which they subsequently returned with their booty, was held to have been properly convicted of abetment of dacoity.

(vii) Chatar Singh v. Emperor, 15 P. R. 1901.

When certain persons pointed out to the dacoits the house to be robbed or actively participated in planning the dacoity and in taking charge of the camels used by the party, the abettors should be punished under Sections 109 and 395 and not Section 397, which applies only to persons actually committing a dacoity in which one of the acts specified is done.

(viii) Queen v. Doorgessur Surmah, 7 W. R. Cr. 61.

A ordered B and C to seize and take D forcibly in the contemplation of an assault upon D, and D was so beaten and tortured as to have died in consequence. It was held that A was guilty at least of abetting the commission of voluntarily causing grievous hurt.

(ix) Emperor v. Dhani Ram, 14 C. P. L. R. 192.

Under Section 108, Explanation 3, it makes no difference in the guilt of the abettor that the agent carries out the desired object under a mistaken belief that the act which he is employed to do is an innocent act.

(x) Queen-Empress v. Sadu, Rat. Un. Cr. C. 207 (1884).

The accused accompanied his brother who was taking a child to murder it; after accompanying him for a while he refused to go further, but at the same time, though knowing full well that the child was being taken to be murdered, he made no attempt to take the child back with him; and the child was subsequently murdered. It was held that under Sections 109 and 111 the accused was guilty of murder.

(xi) Queen v. Kali Churn Gangooly, 21 W. R. Cr. 11.

When a Head Constable, who knew that certain persons were likely to be tortured for the purpose of extorting confessions, purposely kept out of the way, it was held that he was guilty of abetment under Section 107, Explanation 2.

(xii) Queen-Empress v. Munna, 233 A. W. N. 1892.

Two persons were holding the deceased with the intention of beating him, when another came and beat him so heavily that he died in consequence. It was not shown that the two persons intended to cause death or knew that their act was likely to cause death. It was held that they could not be convicted of abetment of murder.

(xiii) Sahib Ditta v. Emperor, 20 P. R. 1885.

The accused gave B money to kill N by charms; he is guilty of abetting the murder of N; and it is immaterial that the means employed by the murderer were other than those by which the accused desired the crime to be effected; or that the means suggested by the accused could not have effected the death of N if they had alone been employed.

(xiv) Bahadur v. Emperor, 34 P. R. 1882.

A was convicted under Section 118 on the ground that he concealed the intention on the part of P to commit murder knowing that he would thereby facilitate the murder, the Court holding that it was an illegal omission on the part of the accused not to report the intention to commit murder.

It was held on appeal that as the accused was not a village headman or village watchman or owner or occupier of land or other person bound under Section 90, Cr. P. C., to report the intention to commit a non-bailable offence, and there was no provision of law by which he was bound to report the existence of a design to commit murder, his omission to report such design could not be held to have been an illegal omission, and as he had not concealed the design by any overt act, his conviction must be set aside.

(xv) Kunhya v. Goordial, 10 P. R. 1868.

The mere presence at a murder without previous concert or approval of the deed does not constitute abetment of murder.

(xvi) Sukha v. Emperor, 43 Ind. Cas. 827 = 19 Cr. L. J. 235 (All.) (1918).

H and S in pursuance of a conspiracy to obtain a certain girl by show of force went to her mother's house and asked her to give up the girl. The mother refused to do so, and H thereupon fired a gun loaded with kankar at her, and she

died from the wounds. It was held that S was not guilty of abetting the death of the mother, inasmuch as the death was not a probable consequence of the conspiracy, and was not caused under the influence of the instigation or with the aid or in pursuance of the conspiracy which constituted the abetment.

(xvii) *In re Nennun Rani Reddi*, 17 Cr. L. J. 175=33 Ind. Cas. 555 (Madras) (1916).

In order to secure a conviction for the abetment of murder under Section 107 it is essential for the prosecution to prove that the accused knew that the actual murderer did intend to commit the murder. Where, therefore, the only evidence against the accused was that he was found within a few yards of the scene of the murder, but no weapon was found on him, and no overt act was alleged tending even remotely to facilitate the commission of the crime, it was held that he could not be convicted of abetment to murder.

B. Body not found.

Although under some circumstances a charge of murder may be sustained when the body of the person said to have been murdered is not forthcoming, still, when this is the case, the strongest possible evidence as to the fact of the murder should be insisted on before the accused is convicted.

(*Adu Shikdar v. Queen-Empress*, 11 C. 635, 1885.)

On page 642:—In Russell on Crimes, 4th Edition, Vol. I, page 770, it is said: "It has been considered a rule that no person should be convicted of murder unless the body of the deceased has been found....., but this rule, it seems, must be taken with some qualifications, and circumstances may be sufficiently strong to prove the fact of the murder though the body has never been found. Thus when the prisoner, a mariner, was indicted for the murder of his captain at sea, and a witness stated that the prisoner had proposed to kill the captain, and the witness, being afterwards alarmed in the night by a violent noise, went up on deck, and there observed the prisoner take the captain up and throw him overboard into the sea, and that he was not seen or heard of afterwards, and that near the place on the deck where the captain was seen a billet of wood was found, and that the deck and part of the prisoner's dress was stained with blood, the Court, though they admitted the general rule of law, left it to the Jury to say upon the evidence whether the deceased was not killed before the body was cast into the sea, and the Jury being of that opinion, the

person was convicted and afterwards executed. But when upon an indictment against the prisoner for the murder of her bastard child it appeared that she was seen with the child in her arms on the road from the place where she had been at service to the place where her father lived about 6 in the evening, and between 8 and 9 she arrived at her father's house without the child, and the body of a child was found in a tide river near which she must have passed in her road to her father's house, but the body could not be identified as that of the child of the prisoner, and the evidence rather tended to show that it was not the body of such child, it was held that she was entitled to an acquittal; the evidence rendered it probable that the child found was not the child of the prisoner, and with respect to the child which was really her child the prisoner could not by law be called upon either to account for it or to say where it was unless there were evidence to show that her child was actually dead."

I will not go so far as to say that under no circumstances in this country could a charge of murder be sustained without proof of the finding of the dead body, but considering the well authenticated instances of the subsequent appearance in the flesh of persons said to have been murdered, and whose death has been deposed to by eye witnesses, the production of bones, alleged to be those of a man and discovered to be those of a woman, and the numerous charges which are brought against innocent persons, I should require the strongest possible evidence of the fact of the murder if the body were not forthcoming."

In Empress of India *v.* Bhagirath, 3 A. 383, there was a confession by the accused and conclusive and overwhelming evidence, and it was held that the mere fact that the body was not found was not a ground for refusing to convict a person of murder; and in Empress *v.* Sedhu, 160 A. W. N. 1882, it was held that the fact that the murdered body was not found is no reason for not passing a sentence of death when the offence of murder is clearly proved.

Similarly in Crown *v.* Bunyan, 13 P. R 1869, where there was no direct evidence, but a skull and clothes of a woman had been found, and the accused had confessed that he had burnt the body, the conviction for murder was upheld.

In Mehr Khan *v.* Emperor, 6 P. R 1886, though it was held that there was no rule of law that no person should be convicted of murder unless the body of the murdered person

has been discovered, and that when the circumstances are such as to make it morally certain that a crime has been committed, the inference that it was so committed was as safe as any other inference ; in this particular case it was held that it was not morally certain that the person said to have been murdered had been murdered, and the conviction was set aside.

In Biru v. Empress, 15 P. R. 1890, a conviction of murder was set aside on the ground that when the whole proof of the *corpus delicti* consists of uncorroborated statements of the accused made under pressure and promptly withdrawn when the immediate causes of the disclosure made had been pointed out, great caution is required in placing reliance on them ;

and in Ghulam Hussain v. Queen-Empress, 6 P. R 1900, the Punjab Chief Court held that before an accused can be properly convicted of murder it must be proved beyond doubt that murder has been committed and that a veritable *corpus delicti* exists.

There is one ruling of the Bombay High Court, namely Queen-Empress v. Kashna, Rat. Un. Cr. C. 687 (1894), that when a prisoner admits having thrown a girl into the canal, but the body cannot be found, it is inexpedient to convict him of murder, his act would properly be met by a conviction of attempt to murder.

In Queen v. Poorusoolah, 7 W. R. Cr. 14, when a man was struck on the head in a boat with a heavy paddle and knocked overboard in a large river in the height of the rains, and had never been heard of since, a conviction for murder was upheld. Similarly in Queen v. Budduruddin, 11 W. R. Cr. 20, it was held that the accused was rightly convicted of murder when he had by his own confession pushed the deceased out of a boat at night and murdered her, but that as the body was not found, the Judge exercised a proper discretion in not passing sentence of death.

C.—Section 201.

Whoever, knowing or having reason to believe that an offence has been committed, causes any evidence of the commission of that offence to disappear with the intention of screening the offender from legal punishment, or with that intention gives any information respecting the offence which he knows or believes to be false, shall, if the offence which he knows or believes to have been committed is punishable with

death, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine; and, if the offence is punishable with transportation for life or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and, if the offence is punishable with imprisonment for any term not extending to ten years, shall be punished with imprisonment of the description provided for the offence for a term which may extend to one-fourth of the longest term of the imprisonment provided for the offence, or with fine, or with both.

ILLUSTRATION.

A, knowing that B has murdered Z, assists B to hide the body with the intention of screening B from punishment. A is liable to imprisonment of either description for seven years, and is also liable to fine.

In order to justify a conviction under Section 201, it is necessary to show that an offence for which some person has been convicted or is criminally responsible has been committed.

(Emperor *v.* Abdul Kadir, 3 A. 279;

Matuki Misser *v.* Queen Empress, 11 C. 619.)

Section 201 refers to persons other than the actual criminals who, by their causing evidence to disappear, assist the principals to escape. The person who commits the offence and afterwards cancels the evidence of it cannot be punished on both heads of the charge, and Section 201 does not apply to a criminal causing disappearance of evidence of his own crime.

(Queen *v.* Ram Soondar Shootar, 7 W. R. Cr. 521;

Reg. *v.* Kashinath Dinkar, 8 B. H. C. Cr. 126;

Empress *v.* Kishna, 2 A. 713;

Queen-Empress *v.* Lalli, 7 A. 749;

Queen-Empress *v.* Dungar, 8 A. 252;

Emperor *v.* Behali Bibi, 6 C. 789;

In re Nalli Narasigadu, 30 Ind. Cas. 135, Madras = 16 Cr. L. J. 582.)

When the evidence makes it certain that one of two persons is the actual murderer, but it is not certain which should be convicted under Section 302 and which under Section 201, neither can be convicted under Section 201.

(*Torap Ali v. Queen-Empress*, 22 C. 638.)

But a person against whom a charge under Section 302 fails can be convicted under Section 201 if a charge under that section is brought home to him, though it would not be safe and proper to convict an accused person under this section merely upon his own confession made while under a charge of murder, and exculpating himself from, and inculpating others in, the crime.

(*Nazir v. Emperor*, 6 P. R. 1902.

Bucha v. King-Emperor, 1 P. R. 1904.)

Section 201 is an attempt to define the position known in England as that of an accessory after the fact. It is settled law that a principal cannot be convicted as an accessory after the fact. The rule laid down in *Empress v. Limbya* (Unreported Cr. Case, Bom. H.C.R. 1895 at p. 799) may be accepted, that when it is impossible to say definitely, however strongly it might be suspected, that an accused was guilty of murder, mere suspicion was no bar to a conviction under Section 201. But if it be accepted as a proved fact that the accused before the court disposed of a dead body, and if the acceptance of that fact completes the chain of circumstantial evidence which proves beyond doubt that the accused were actual principals present at the murder and taking part in the murder, they cannot be convicted of the minor offence of causing evidence of the murder to disappear even though by an error of the Judge or by a misconception of the position by the Public Prosecutor the charge of murder is subsequently withdrawn.

(*Sumanata Dhupi v. Emperor*, 20 C. W. N. 166 = 23 C. L.J. 333 = 17 Cr. L. J. 4 = 32 Ind. Cas. 132, 1916.)

Where the accused allowed a dead body to remain near their fields and gave no information of the occurrence of a crime, which they had good reason to believe had been committed, but no positive act of concealment was proved against them, it was held that there was no offence under Section 201, but accused were guilty under Section 202.

To sustain a conviction under Section 201 it is necessary to adduce proof that the accused, hearing or having reason to believe that an offence had been committed, caused evidence of the commission of the offence to disappear with the intention of screening the offenders from legal punishment.

(*Mir Afzal v. Empress*, 25 P. R. 1881.)

When the accused, having reason to believe that a murder had been committed, and that Mt. B, the wife of the murdered man, was aware of the fact, took her away from the village where it was likely that enquiries as to the fate of the murdered man would be made, lest she should give information, it was held that these facts could not be said to constitute an offence under Section 201, as the taking of measures to keep a person out of the way, who is possessed of knowledge of the occurrence of a crime, or who is likely to communicate that knowledge to others, does not amount to causing disappearance of evidence within the meaning of the law.

(*Muhammad Bakhsh v. Emperor*, 21 P. R. 1882.)

When a woman found in her house the dead body of a girl who had been murdered by her son, and locked the outer door without moving the corpse or concealing it, it was held that she was not guilty of causing the disappearance of evidence of a crime under Section 201.

(*King-Emperor v. Rajan*, 53 P. R. 1905.)

D.—Compensation under Section 545.

The Madras High Court has held that it is not legal to award compensation to the widow of a person killed out of a fine imposed under Section 304 A.

(*In re Lutehmaka*, 12 M. 352;

Yalla Sanguli v. Maindi Ali, 21 M. 74 F. B.)

This was followed in *Emperor v. Wawnia Dhangar*, 16 Cr. P. L. R. 180, where it was held that compensation can only be given to the person injured and not to the heirs of a person who has been killed; and a similar finding was given in *Queen-Empress v. Abdul Rahima*, Rat. Un. Cr. C. 763.

The Punjab Chief Court, however, dissented from the view of the Madras High Court, and held in *Queen-Empress v. Saif Ali*, 17 P. R. 1898, that it is competent to the Court under Section 545 to award part of the fine imposed under Section

304 to the widow of the person killed, but in *Chuha v. Crown*, 18 P. R. 1913, it was held that an order of compensation to the nearest heirs without specifying who those heirs may be was not a sufficient compliance with the law.

E.—Murder by Deaf and Dumb Man.

If an accused in a murder case, by reason of being deaf and dumb, is unable to understand the proceedings in Court, in the absence of any clear and specific provision in the Code he should be dealt with as a lunatic, and the matter reported to the Local Government under Section 471.

(Emperor *v. Gahnas*, 37 P. R. 1889 ;

Crown v. Dost Mohammad, 13 P. R. 1911.)

F.—Evidence

There is authority to the effect that the mere fact that an accused person appears to have known where the *corpus delicti* or the plunder, and so forth, was is no proof that he is the murderer. But when an accused person is able successfully to point out not one spot but several, there is a presumption that he had something to do with the murder.

(*Matu v. Crown*, 18 P. R. 1917, referred to *Queen-Empress v. Sami*, 13 M. 426, and *Public Prosecutor v. Chiareddi Murayya*, 12 Ind. Cas. 652, Madras).

The mere fact that a person knows where the body of a murdered man is buried is not in itself sufficient evidence to convict him of murder ; and a statement by the accused before the police that he had buried the body is not admissible in evidence (*Emperor v. Turezi*, 55 Ind. Cas. 685).

In 13 M. 426 it was held that in cases in which murder and robbery have been shown to form parts of one transaction, the recent and unexplained possession of the stolen property, while it would be presumptive evidence on the charge of robbery, would similarly be evidence on the charge of murder. This ruling was followed in *Public Prosecutor v. Chiareddi Murayya* (2 M. W. N. 478 = 21 M. L. J. 1071 = 12 Cr. L. J. 564) and in *Ramji v. Emperor* (53 Ind. Cas. 481, Nagpur).

Unexplained possession of the jewellery of a murdered child shortly after the murder taken with the other circumstances of the case is good evidence of the murder. (*In re*

Botcha Ramudu, 6 M. L. T. 123 = 4 Ind. Cas. 1051 = 11 Cr. L. J. 157); but though in some cases an inference might be drawn from possession of the property of the murdered person by the accused, it is essential, to justify the inference, that there is satisfactory proof that the property was in fact in the possession of the deceased when last seen alive. The absence of a reasonable motive for the murder is a most weighly circumstance in favour of the accused.

(Moyila Kurmiah v. Emperor, 145 M. W. N. 1913 = 18 Ind. Cas. 337 = 14 Cr. L. J. 49.)

When in a case of murder the facts clearly established were that the accused was last seen with the child alleged to have been murdered, and that he stripped her of most of her ornaments and sold them, and that her body was next found in a well, and the accused disclaimed all knowledge of the matter, though he himself indicated the well, it was held that the accused was guilty of murder.

(Wadhawa Singh v. Emperor, 27 Ind. Cas. 551 = 16 Cr. L. J. 167).

Similarly in a case when the boy left the village with the accused shortly before sunset, and two days later his body was found in a well with a stone tied to it and all the jewels missing; death being due to strangulation, and the accused on the day after the disappearance sold articles similar to or identical with the missing jewels in a village 3 or 4 miles away, and he denied that he had taken the boy, it was held that he was rightly convicted of murder (Public Proceecutor v. Paramanda, 44, M. 443)

But in a case where the accused, admitting the deceased had been at his house immediately before his death, declared that his respiration stopped owing to a fall from the roof and that he took the body and threw it into a tank, where it was afterwards found, and he also produced the ornaments worn by the child on the morning on which he was missed, it was held that this was not sufficient to find the accused guilty of murder, especially when the medical evidence showed that the deceased might have been either intentionally or accidentally strangled, and that the accused could only be found guilty of an offence under Section 411.

(King-Emperor v. Rajani Kanto Koer, 8 C. W. N. 22 = 1 Cr. L. J. 10.)

And when the only evidence was a bundle of clothe which the accused produced, and which was identified as having been stolen from a person proved to have been murdered, and there is no admissible evidence on the record to connect him with the murder, it was held that it was impossible to do more than to convict him under Section 411.

(Ahmad v. Emperor, 220 P. L. R. 1913=23 P. W. R. 1913 =19 Ind. Cas. 707=14 Cr. L. J. 275.)

When a woman was charged with the murder of a girl and on the hope of pardon being given to here she took the police to a place and pointed out and produced certain ornaments which the deceased was wearing at the time of her death, it was held that the evidence was admissible to show that the accused did go to a certain place, and there produce certain ornaments. Such evidence was admissible under Section 8 of the Evidence Act irrespective of whether the conduct of the accused was or was not the result of inducement offered by the Police.

(Emperor v. Misri, 31 A. 592.)

CIRCUMSTANTIAL EVIDENCE.

Circumstantial evidence must be exhaustive and exclude the possibility of the guilt of any other person, or must point conclusively to the complicity of the accused.

(Chirag-ud-din v. Emperor, 18 C. W. N. 1144=11 Cr. L. J. 293=23 Ind. Cas. 501).

But this dictum must be interpreted in a reasonable way. Thus the word "exhaustive" must not be taken to mean that every incident short of the actual commission of the offence must be proved by positive evidence, and the word "possibility" must not be treated as signifying "physical possibility," but a high degree of probability, that is so high a degree of probability that a prudent man considering all the facts and realising that the life or liberty of the accused person depends upon the decision, feels justified in holding that the accused committed the crime.

(Thakar Das v. The Crown, 32 P. R 1916.)

A jury in dealing with a murder case, where there is no direct evidence, but only what is called circumstantial evidence, has a twofold task; it must first decide what portion of the circumstantial evidence has been established, and must then

ask itself whether this is sufficient proof, that is, whether the facts proved exclude the possibility that the deed was done by some other person. It would not be proper to convict merely because the jury thinks the accused's guilt probable. If the jury has doubts, it should let the accused have the benefit.

(The Crown v. Browning, 7 P.R. 1917.)

To prove circumstantial evidence, four things are essential: (1) that the circumstances from which the conclusion is to be drawn should be fully established; (2) that all the facts should be consistent with the hypothesis; (3) that the circumstances should be of a conclusive nature and tendency; (4) that the circumstances should to a moral certainty actually exclude every hypothesis but the one proposed to be proved.

(Empress v. Hoshnak, 139 A.W.N. 1881.)

In a case of murder when there is no direct evidence, and the prosecution case is based merely on circumstantial evidence, considerations of doubt would be entitled to weight if the question were between this and an alternative explanation of the deceased's death, or if there were ground for suspicion of any other person than the accused; but when the evidence points to the accused alone and admits of no reasonable doubt, the accused can be rightly convicted.

(Muhammad Khasim v. Emperor, 718 M.W.N. 1914 = 16 Cr.L.J. 195.)

A conviction for murder cannot be sustained when the only circumstantial evidence against the accused was that the deceased was seized by the accused and the husband of the deceased in the road, placed on a camel, and carried towards a canal in which her body was afterwards found completely dismembered, especially when the evidence of the identification of the body is unsatisfactory, and there is no direct evidence connecting the accused with the crime.

(Chuhar Singh v. Crown, 40 P.W.R. 1914 = 16 Cr. L.J. 89 = 26 Ind. Cas. 1001)

In the absence of reasonable proof of guilt, the presence of colouring matter of blood on certain articles of clothing of the accused, or of mammalian blood on his nail parings, is not of much consequence, and can be explained in various ways.

(Nadir v. Crown, 43 P. W. R. 1914=16 Cr. L. J. 75=26 Ind. Cas. 667.)

The fact that an accused person was found with a gun in his hand immediately after a gun was fired, and a man was killed on the spot from which the gun was fired, may be strong circumstantial evidence against the accused, but it is an error of law to hold that the burden of proving innocence lies upon the accused under such circumstances. If there are two persons who answer the above description, the circumstantial evidence loses its weight very substantially. When there is no evidence which of them fired the fatal shot, and when there is no finding that they had a common intention and acted in concert, and that the gun was fired in furtherance of their common intention, the legal inference from these findings must be that neither of them was guilty of the offence of murder.

(Niran Chandra Roy v. King-Emperor, 11 C. W. N. 1085 =6 Cr. L. J. 304.)

In a case of murder by opium poisoning, the evidence that the accused put some sugar into the vessel in which milk was given to the deceased, and then stirred the milk with his finger and the deceased died a few hours afterwards, was held not sufficient for convicting the accused, particularly when the motive for murder was not strong.

(Kala Singh v. Crown, 25 P. W. R. 1911=241 P. L. R. 1911=12 Cr. L. J. 484=12 Ind. Cas. 92.)

When the corpse of a boy proved to have been murdered by a sharp edged instrument was found floating in a canal, and it was proved that the accused had an unnatural intimacy with the deceased, that the deceased and the accused were seen in company on the evening six days before the discovery of the corpse, after which the deceased was never seen alive again, and the accused pointed out a spot in the canal where he said he had thrown a *darri* and a *gandasa*, and that a *darri* and *gandasa* were actually found in the canal bed at that spot, it was held that these facts were sufficient to justify the finding that the accused murdered the deceased.

(Kapur Singh v. Emperor, 98 P. L. R. 1918=50 Ind. Cas. 481.)

The mere fact that a conviction for murder is based on

circumstantial evidence is not a reason for passing the lesser sentence allowed by law.

(Public Prosecutor *v.* Paramandi, 44 M. 443.)

Although it is not illegal to convict a person on his own plea of guilty on a charge of a capital offence, it is advisable for the Court to take the whole of the evidence offered by the prosecution and not to convict the accused solely on his own admission.

(Queen-Empress *v.* Bhadu, 19 A. 119.)

Pala Singh *v.* King-Emperor, 54 P. R. 1905.)

A wife who knew all about the proposal to murder her husband and was a consenting party to the commission of a crime is in the position of an accomplice, and her evidence should not ordinarily be accepted either as corroborative of the evidence of an approver or as sufficient, apart from independent corroboration, to justify the conviction of the accused.

(Shahrah *v.* Crown, 20 P. R. 1919.)

G.—Joint trials and charges.

When the accused were at one and the same time tried for the offence of murder and robbery committed in the course of one transaction and for another robbery committed two or three hours previously, and at a place close to the scene of the robbery and murder, it was held that the trial of these separate offences together, though an error or irregularity within the meaning of Section 537, would not necessarily render the whole trial void.

(Queen-Empress *v.* Mulua, 14 A. 502.)

Where certain persons who were alleged by the prosecution to have committed three, if not four, separate dacoities in the course of the same night were charged to the effect that they committed dacoity and were punishable under Section 395, it was held that the charge ought to have specified each alleged dacoity separately, and that in the form in which it was drawn it was not merely irregular, but bad in law, and a new trial was ordered.

(Emperor *v.* Fatta, 26 A. 195; reference made to the P. C. ruling 25 M. 61, which overruled 27 C. 839.)

CHAPTER XIII.

ADDITIONAL NOTES AND CORRECTIONS.

Section 299 (b) and Section 300 (2) and (3).

The theory that an offence may fall under the second clause of Section 299, but not under any clause of Section 300, such an offence being punishable under the first part of Section 304, has also been adopted by the Court of the Judicial Commissioner of Sind in *Crown v. Hashim*, 7 S. L. R. 29 = 14 Cr. L. J. 459 = 20 Ind. Cas. 619.

Therein it was held that in cases of death caused by reckless violence and without premeditation, a safer criterion to determine whether the accused is guilty of the offence of culpable homicide not amounting to murder is the nature of the weapon used rather than the nature of the injury inflicted.

This Court has also adopted the theory of the restricted interpretation of the second clause of Section 300. As has been pointed out in Chapter I, the one theory is the necessary corollary of the other. Both have been adopted by the Courts of Bombay, Sind and Burma; and neither by any other Court.

It may be noted here that in the case *Perumal Naiken v. Emperor*, 193 M. W. N. 1912 (see pages 29 and 51), the sentence was transportation, but it appears from the judgments that it was intended that the conviction should be under the second part of Section 304 and not the first part; for instance, Abdur Rahim, J., wrote:—"One would not under the circumstances be justified in presuming that he intended to cause such injury to the deceased as was likely to cause her death." A conviction under the first part of Section 304 would not be compatible with such a finding.

Chapter II.

On page 52 the case *Sundar Singh v. Crown*, 6 P. W. R. 1912, has been discussed. On account of an incorrect and misleading head-note the facts are wrongly given. The accused was the *rukha*, and the sweeper was attempting to steal the gram. Moreover, it is not clear from the judgment under which part of Section 304 the accused was convicted. The judgment concludes as follows:—"I am convinced that the accused did kill Kalu intentionally, and that conviction is correct; but it is doubtful whether seven years' rigorous imprisonment is not too severe a sentence. Sundar Singh was

doing his duty in preventing Kalu from stealing his gram ; and this circumstance, coupled with the fact that Kalu, who also seems to have been a man of considerable physical strength, started a desperate struggle with him, affords some slight excuse for Sundar Singh's proceeding to extremities. I therefore reduce the sentence to four years' rigorous imprisonment." As it was held that death was intentionally caused, it is doubtful whether the conviction was under the second part of Section 304.

On page 68 it is noted that the case Emperor *v.* Hanuman had not been entered in that chapter as there were five assailants. Inadvertently the case was also omitted from Chapter VII. The facts were :—Five men, members of the same family, assaulted an unarmed man and beat him with *lathis*. They knocked him down and continued beating him with the result that he died there and then. Another man who came to the rescue of the first was also knocked down and beaten with a similar result.

Chapter V., page 157

The rulings that an action under Section 323 is personal and abates on the complainant's death have been overruled by Hazara Singh *v.* Crown, 2 L. 27, wherein it was held that criminal proceedings once instituted, whether upon a complaint or otherwise, do not terminate or abate merely by reason of the death of the complainant or of the person injured. The same has been held by the Madras High Court in Public Prosecutor *v.* Paramandi, 44 M. 433.

Chapter IX., page 294.

The facts of Alexander Ruffe's case are not given in the Punjab Record. They are to be found in 24 P. W. R. 1912. The head-note is not quite correct. It was found that the appellant's conduct during the trial indicated very plainly decided mental aberration. Although there was no insanity, and Section 84 could not be applied, it was held that, in view of the circumstances and without palliating the heinousness of the offence, a sentence of five years' rigorous imprisonment would meet the ends of justice.

Chapter X., page 317, Section 94.

In the case Killikyatara Bomma *v.* Emperor, a woman, induced by threats of death, had called her lover to a place

where the accused were waiting to murder him. It was held that she could not claim the benefit of Section 94, inasmuch as murder is an offence to which that section does not apply. She was not an accused person, so the question was not discussed in detail ; but it would appear to be open to doubt whether the word "murder" in Section 94 includes also "abetment of murder."

It might be argued that the offence of abetment of murder is punishable with death, and therefore is not distinct from the offence of murder ; but this argument could not apply to a case of attempted murder punishable under Section 307. Thus if a man, under the compulsion of threats and fear of instant death shoots at another man with intend to kill him, but death does not ensue, he will escape all punishment by the application of this section ; and yet his offence is much more serious than that of a blacksmith, for instance, who is compelled to aid and abet the offence of murder by opening the lock of a door knowing that it is intended that the person inside will be murdered.

If Section 94 does not apply to his case, the minimum sentence to which he will be liable will be transportation for life, which would certainly be far in excess of his deserts. If this is the correct interpretation of the law as it stands, some amendment would appear to be necessary, such as the addition of a clause that if the offence committed under such circumstances is abetment of murder, then such person is liable either to the punishment provided for the offence of murder or to imprisonment or fine.

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